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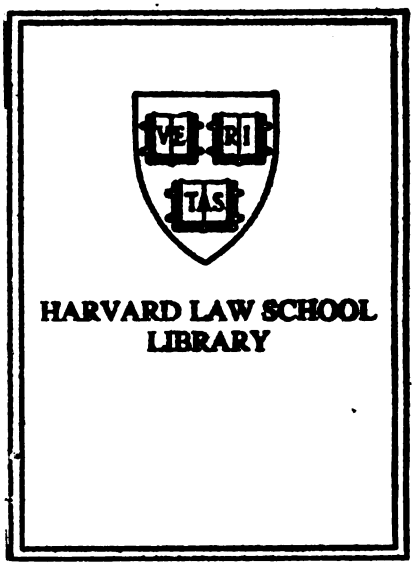

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MICHIGAN REPORTS

CASES DECIDED

IN THE

SUPREME COURT

OF

MICHIGAN

FROM

JULY 18 TO DECEMBER 13, 1898

JOHN A. BROOKS
STATE REPORTER

MARQUIS B. EATON
ASSISTANT

VOL. 118
FIRST EDITION

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1900

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SUPERIOR COURT OF GRAND RAPIDS, EDWIN A. BURLINGAME.

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MANOR *v.* BAY CITIES CONSOLIDATED RAILWAY CO

STREET RAILWAYS—COLLISION WITH VEHICLE—CONTRIBUTORY NEGLIGENCE OF DRIVER.

Plaintiff's wife was driving, in a sparsely-settled neighborhood, a covered milk wagon, which had doors at the sides and a small window at the back. The weather was cold, and she had a shawl over her head and ears. Before crossing the track of an electric railway, upon which cars ran at half-hour intervals, she looked up and down the track, but no car was visible. She could see to the west a half mile. After crossing, she drove east, parallel with the track, but at such a distance therefrom that she thought a car could pass without hitting the wagon. The traveled portion of the roadway was narrow, and she guided the horse so that the wheels of the wagon would follow in the ruts. After driving about 300 feet, she heard a bell, and attempted to turn out farther, but, before she could do so, an east-bound car struck the wagon. *Held*, in an action against the company, not to show contributory negligence as a matter of law.[1]

2. SAME—INSTRUCTIONS.

In view of the facts of the particular case, it was not reversible error for the court to charge that "she had a right to drive down the track just as she did, and if she turned out, or tried to turn out, immediately on the sounding of the gong, she was blameless, and there is no contributory negligence in the case;" and that "a man may drive ahead of you with a wagon, * * * but * * * you must wait until your opportunity comes to pass, and the same rule applies to a street car,"— further instructions making it clear to the jury that the question of contributory negligence was for their determination, and that if they should find that she drove in front of the car after she had turned out (as claimed by

* Continued from Vol. 117.

[1] The authorities on liability for injuries by street-car collisions with vehicles or horses are collated in a note to *Hicks* v. *Citizens' R. Co.*, (Mo.) 25 L. R. A. 508.

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the company), and it was then so near to her that it could not be stopped, they should return a verdict of no cause of action.

Error to Bay; Maxwell, J. Submitted June 10, 1898. Decided July 18, 1898.

Case by Napoleon Manor against the Bay Cities Consolidated Railway Company for negligent injuries. From a judgment for plaintiff, defendant brings error. Affirmed.

T. A. E. & J. C. Weadock, for appellant.

H. M. Ready (*Simonson, Gillett & Courtright*, of counsel), for appellee.

MOORE, J. This is one of two cases, both by agreement tried as one, growing out of a collision between an electric car belonging to defendant, and a milk wagon in charge of the wife of plaintiff. A judgment was recovered of $81, from which defendant appeals.

Defendant's road is an electric road. The wife of the plaintiff was driving a milk wagon in the village of Essexville. She had occasion to cross the track from the south. She was riding in a covered wagon, which had doors at the sides, and a small glass window at the back. The weather was cold, and she had her shawl over her head and ears. According to her testimony, before crossing the track, she stopped the wagon, opened the doors, and looked both ways. She could see to the west a half mile. She saw no car, and crossed the track, and turned to the east, on the north side of the track, and parallel with it. The street on the south side of the track was sandy and soft, and for that reason was not traveled to any extent. On the north side of the track, for about nine feet from the track, it was macadamized with broken stone, which was worn smooth only in two narrow parallel tracks, where the wheels of vehicles ran. Mrs. Manor drove her horse so the wheels of the wagon would follow in these

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beaten portions of the road. She was familiar with this street, having driven on it frequently. She says she supposed she was driving far enough away from the track so that a car coming from the west could pass her without hitting the wagon. There were two cars run over this line. They passed at intervals of one-half hour each. Mrs. Manor says she looked west as she crossed the track, and saw no car. She had driven east about 300 feet when she heard a bell, and instantly attempted to guide her horse away from the track, when at once her wagon was struck by the car which had overtaken her, and the injury was done.

When the testimony of the plaintiff was all in, the court was asked to direct a verdict for the defendant, upon the ground that plaintiff was guilty of contributory negligence. The court refused to do so, and this is said to be error. We cannot agree with counsel in this claim. It is true, the defendant must run its cars upon the rails, and cannot turn out upon the street; but it has no exclusive right to the use of the street. The plaintiff also had a right to drive her vehicle in the beaten portion of the road, and to act as a reasonable and prudent person would under like conditions. She might dress against the inclemency of the weather. The motorman could see her vehicle for a half mile. He had notice of its proximity to the track, and of the danger to it if he let his heavy car run against it. It is true, he says in his testimony that he rang his gong, and saw Mrs. Manor turn away from the track, and he supposed he could pass her safely, when she turned back into the dangerous position again, and was hit. Testimony was offered supporting and rebutting the testimony of the motorman; but it is perfectly evident from the record that but a moment's delay and a little more care on the part of the motorman would have avoided the injury. When the motion was made, the defense had not introduced any testimony, and we do not think it could be said as a matter of law that, under the facts then disclosed by the record, the defendant was excused from any liability because of the injury.

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After this motion was overruled, defendant put in testimony which, if believed by the jury, made a complete defense. Testimony was introduced to rebut this defense. The case was submitted to the jury in a charge which is claimed by defendant to be erroneous. The record does not disclose that any written requests were preferred by counsel for defendant. So much of the charge as counsel think necessary for the purpose of making their point is cited in the brief. If more of the charge had been quoted, it would have modified what was quoted. So far as it is necessary to quote, the language used by the circuit judge was as follows:

"Now, gentlemen, the view I take of this testimony narrows the points for your consideration down to two propositions. The woman has given her testimony as to crossing the track, and driving along down beside it. There is no evidence in the case that the thoroughfare was crowded, or that there was any occasion for unusual caution on anybody's part in the matter. She had a right to cross the railroad, and she had a right to drive down the track, just exactly as she did; and if she turned out, or tried to turn out, immediately on the sounding of the gong, she was blameless; there is no contributory negligence in the case. But if, instead of turning out, and getting out of the way, or attempting to, she turned out in part, and turned around and tried to get back to that position, as testified to by some of the witnesses, and that was the reason why the accident happened, she cannot recover in either case; neither can recover a penny. You have heard the testimony upon that branch of the case, and you will judge of it just exactly — You know it just as well as I do; and it is your province and your duty to determine what the facts were about it. That place there was a common street or highway. Both the railroad company and she had a right there, and when one overtakes another — A man might drive ahead of you with a wagon, and you might be so crowded or loaded that you could not get by him; but you cannot have your horses jam onto his wagon; you must wait until your opportunity comes to pass. The same rule applies to a railroad company. The manager of that car must not be guilty of negligence or carelessness. He had a right to run up to the wagon. He must slow down and get con-

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trol of his car more effectually even than the counsel has stated to you here, so that the control is approximately absolute. A street car and a locomotive are tremendous agencies. They are necessary for the good of society, but they are very dangerous; and while the defendant is innocent if merely running its car and managing it as well as it can, or as a prudent, careful, competent man can manage it, it can do all that and be blameless, and no court or jury has any right to find any damage against it for such conduct. But if this statement was that the woman was trying to get away from the car, and he could have stopped it, and prevented the accident, he was bound to do it. Hence, if that is all there is of the case, your inquiry on the merits of the case perhaps might as well end there. But if, going further, you think that she tried to drive in front of the car after she turned out, and it was so near to her that the men could not have stopped, and that that caused or contributed to cause the accident, you will find no cause of action. A great deal of law argument has been had, and law submitted, to the effect that the plaintiff in this case was guilty of contributory negligence in driving along down the street as she did. I don't think there was any negligence in doing so until she heard the bell from the car; but that is a matter for you to determine."

In determining whether this charge is error, we must take the facts disclosed by the record into consideration. This accident did not occur in a crowded street, or in a thickly-populated neighborhood, or in an attempt to cross the track. Mrs. Manor was familiar with her surroundings. She knew when she crossed the track there was no car in sight, and that she would be in sight of the motorman approaching behind her for more than a half mile. She also knew the cars ran only once each half hour. The portion of the roadway which was macadamized and used by the public was comparatively narrow. She was driving in the usually traveled portion of it, at a distance which she thought was far enough away so she would be safe. It was not unreasonable for her to expect that a car overtaking her would not run into her vehicle without first giving her such notice as would enable her to get out of the way. While it doubtless would have been better

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for the court to abstain from expressing any opinion as to the negligence of Mrs. Manor, he told the jury it was a question for their determination. He reviewed briefly the claims of the parties, and told the jury, if the facts were as sworn to by the motorman and the witnesses for the defendant, plaintiff could not recover. In *Laethem* v. *Railway Co.*, 100 Mich. 297, it is held, when the driver of a street car sees that a sleigh is standing so near to the car track as to make the striking of it certain unless it is removed, he is bound, if able to do so, to stop his car, if he sees the driver of the sleigh is unable to move soon enough to avoid the accident. See *Montgomery* v. *Railway Co.*, 103 Mich. 46 (29 L. R. A. 287). In the case of *La Pontney* v. *Shedden Cartage Co.*, 116 Mich. 514, in speaking of the duty of a motorman towards the driver of a vehicle loaded with a merry-go-round, Justice MONTGOMERY used this language: "It was the duty of plaintiff to have the car under such control as to admit of its being stopped after he became able to discern objects on the track, and before a collision with such objects should occur,"—citing a number of cases. See, also, *Goldrick* v. *Railroad Co.*, (R. I.) 37 Atl. 635, 2 Am. Neg. Rep. 647. Taking the charge as an entirety in connection with the facts shown by the record, reversible error is not shown.

The judgment is affirmed.

The other Justices concurred.

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BALL v. RIDGE COPPER CO.

1. TAXES—REVIEW—VALIDITY OF ROLL.
   The failure of the board of review to enter the valuations of the several parcels of land, as fixed by it, in the column of the assessment roll prepared for that purpose, as required by section 29 of Act No. 206, Pub. Acts 1893, does not invalidate the tax, where it does not appear that any changes of valuation were made by the board, in view of the further provision that the roll as prepared by the supervisor shall stand as approved and adopted as the act of the board of review, except as changed by vote of the board.

2. SAME—ENFORCEMENT—EFFECT OF DECREE.
   A valid decree in proceedings for the sale of land delinquent for taxes forecloses all questions as to the validity of the assessment.

3. SAME—CONSTITUTIONALITY OF ACT—DUE PROCESS OF LAW—NOTICE.
   The tax law of 1893 is not unconstitutional as depriving persons of their property without due process of law, in that it makes no provision for personal service of notice upon the delinquent taxpayer of the proceeding for the sale of his land, but, on the contrary, provides (section 66) that notice by publication shall be equivalent to personal service.

4. SAME—CONCLUSIVENESS OF DEED.
   Nor is the whole act rendered void by reason of the provision therein (section 72) attempting to make tax deeds conclusive evidence of title.

5. SAME—RIGHT TO JURY TRIAL—WRITS OF ASSISTANCE.
   Nor is the constitutional right of trial by jury violated by the provision of the act (section 72) authorizing the court to put the purchaser in possession of the premises by writ of assistance.

6. CORPORATIONS—WRITS OF ASSISTANCE—DEMAND OF POSSESSION.
   A demand for the possession of land, made upon the agents of a corporation who are in the actual occupancy thereof, is a sufficient foundation for an application for a writ of assistance as against the corporation.

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Appeal from Ontonagon; Haire, J. Submitted January 27, 1898. Decided July 18, 1898.

Petition by J. Everett Ball against the Ridge Copper Company for a writ of assistance. From an order granting the writ, respondent appeals. Affirmed.

Ball & Ball (*M. J. Sherwood* and *Dan H. Ball*, of counsel) for petitioner.

Clark & Pearl, for respondent.

LONG, J. A petition for a writ of assistance was filed by J. Everett Ball in a proceeding by the auditor general of the State in the Ontonagon circuit court, in chancery, for the sale of certain lands delinquent for taxes. Respondent answered the petition, and, after a hearing in that court, an order was made directing that the writ of assistance issue. Respondent appeals.

It appears that the lands were bid in by the State in December, 1895; and in February, 1897, the auditor general executed and delivered to the petitioner deeds for the lands. Demand of possession was made upon the parties in possession of the lands by the petitioner, and, upon the refusal to surrender, this petition was filed. Respondent answered the petition, and by the answer claimed:

(1) That the court had no jurisdiction to enter the decree of sale, for the reason that there was no completed assessment roll, as it was not reviewed by the board of review of the township, as required by the statute; that there was no proper certificate attached, and no entry of values by the board in separate columns.

(2) That the tax law of 1893, under which the lands were sold, is unconstitutional, in that it provides for no personal service of notice upon the landowner of the proceeding for the foreclosure of the tax lien, which results in a decree and sale of the land, thus depriving the owner of his property without due process of law, contrary to the provisions of the fourteenth amendment to the Constitution of the United States; and also that it is unconstitutional for the reason that it provides that the tax deed shall be conclusive evidence of title in the tax purchaser.

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(3) That the act is also unconstitutional in so far as it provides for the granting of a writ of assistance to the purchaser of the tax title, as it deprives the owner of the right to try the title to his land before a jury in an action of ejectment.

The questions will be discussed in the order stated in the answer.

1. Section 29, Act No. 206, Pub. Acts 1893, provides for a meeting of the board of review in each township on the Tuesday next following the third Monday of May in each year; that the supervisor shall submit to the board his assessment roll, and the board shall examine and review the same. The board is given power, on sufficient cause shown, to add the names of persons to the roll; also, the values and descriptions of personal and real property liable to assessment, which has been omitted. It may also correct errors in names and descriptions of property. This section then provides:

"The board shall pass upon each valuation and each interest, and shall enter the valuation of each, as fixed by it, in a separate column. The roll as prepared by the supervisor shall stand as approved and adopted as the act of the board of review, except as changed by a vote as herein provided."

Section 30 provides:

"After said board shall complete the review of said roll, a majority of said board shall indorse thereon and sign a statement to the effect that the same is the assessment roll of said township for the year in which it has been prepared and approved by the board of review."

An abstract of the assessment rolls for 1892 and 1893 is contained in the record. In each of these years the columns for the valuations fixed by the board are left blank. There is a certificate attached to each roll, and signed by the members of the board of review, in the following form:

"Assessment roll for the township of Greenland, county of Ontonagon, and State of Michigan, for the year 1892 [and 1893], as approved by the board of review."

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There is nothing upon either roll showing that the board of review made any changes in the roll by adding to or striking from the roll. Inasmuch as the statute provides that "the roll as prepared by the supervisor shall stand as approved and adopted as the act of the board of review, except as changed by a vote as herein provided," and there being no figures in the columns which are prepared for such changes, the presumption follows that no changes were made by the board, and hence there was no necessity to insert any figures in such columns. *Chamberlain* v. *City of St. Ignace*, 92 Mich. 335. But, in any event, that question was foreclosed in the auditor general's proceedings in which the decree was entered. *Muirhead* v. *Sands*, 111 Mich. 487.

2. Section 62 of the act provides that, on the filing of the petition by the auditor general, the court shall make an order fixing a day for hearing, etc. Section 66 provides that this petition and order shall be published at least once in each week for four successive weeks next prior to the time of hearing, and further provides:

"The publication of the order and petition aforesaid shall be equivalent to a personal service of notice on all persons who are interested in the lands specified in such petition of the filing thereof, of all proceedings thereon, and of the sale of the lands under the decree, and shall give the court jurisdiction to hear such petition, determine all questions arising thereon, and to decree a sale of such lands for the payment of all taxes, interest, and charges thereon."

It appears that the respondent is a resident corporation, and was in possession and occupancy of the lands in controversy here.

It was said in *Muirhead* v. *Sands*, *supra*, that—

"The statute makes the publication the equivalent of personal service, and it is therefore the duty of the owner to watch the proceedings provided for by the statute for the foreclosure of the lien, and interpose any objection he may have to the validity of the tax. The purpose of the statute is to give every person his day in court, in an equitable proceeding."

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This case followed the rule of this court in *Cole* v. *Shelp*, 98 Mich. 58, and *In re Wiley*, 89 Mich. 58. Inasmuch as counsel have reargued that question in their briefs, we have re-examined it, and are satisfied that the ruling heretofore made must be adhered to. Judge COOLEY, in the second edition of his work on Taxation (page 527), speaking of the proceeding to enforce the payment of the tax upon land, and of its nature, says:

"Proceedings of this nature are not usually proceedings against parties; nor, in the case of lands or interests in lands belonging to persons unknown, can they be. They are proceedings which have regard to the land itself, rather than to the owners of the land; and if the owners are named in the proceedings, and personal notice is provided for, it is rather from tenderness to their interests, and in order to make sure that the opportunity for a hearing shall not be lost to them, than from any necessity that the case shall assume that form. As in all other cases of proceedings *in rem*, if the law makes provision for publication of notice in a form and manner reasonably calculated to bring the proceedings to the knowledge of the parties who exercise ordinary diligence in looking after their interests in the lands, it is all that can be required."

Two years before the above work was written, Mr. Justice COOLEY, in the *State Tax-Law Cases*, 54 Mich. 362, had said:

"The first objection made to the statute is that it makes no provision for personal service on resident owners of land. We think this objection without force; but, in view of the necessary length of the opinion, we pass it without discussion, for the reason that the respondent, by filing demurrer, has put itself in a position which precludes the raising it."

In *Pennoyer* v. *Neff*, 95 U. S. 714, the distinction is clearly drawn between actions in which the notice must be personal and those in which it may be by substituted service, as by publication, and it is said: "Such service [substitutive] may answer in all actions which are substantially proceedings *in rem*." This rule was also recognized and followed in *Francis* v. *Grote*, 14 Mo. App.

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324; *Eitel* v. *Foote*, 39 Cal. 439; *Chauncey* v. *Wass*, 35 Minn. 23; *Kansas City* v. *Duncan*, 135 Mo. 583; *Dousman* v. *City of St. Paul*, 23 Minn. 398. See, also, Black, Tax Titles, § 166.

In *Winona, etc., Land Co.* v. *Minnesota*, 159 U. S. 537, the question of the sufficiency of the notice by publication under the Minnesota tax statute was under consideration. Mr. Justice Brewer said:

"All the privileges which are secured to the property owner in respect to the taxes of the current year are also secured to him in reference to those imposed under amended section 113. He is therefore notified and given an opportunity to be heard before his property is taken from him. Questions of this kind have been repeatedly before this court, and the rule in respect thereto often declared. That rule is that a law authorizing the imposition of a tax or assessment upon property according to its value does not infringe that provision of the fourteenth amendment to the Constitution which declares that no State shall deprive any person of property without due process of law, if the owner has an opportunity to question the validity or the amount of it either before that amount is determined or in subsequent proceedings for its collection. * * * That the notice is not personal, but by publication, is not sufficient to vitiate it. Where, as here, the statute prescribes the court in which and the time at which the various steps in the collection proceedings shall be taken, a notice by publication to all parties interested to appear and defend is suitable, and one that sufficiently answers the demand of due process of law,"—citing *State Railroad Tax Cases*, 92 U. S. 575, 609; *Hagar* v. *Reclamation District*, 111 U. S. 701, 710; *Kentucky Railroad Tax Cases*, 115 U. S. 321; *Lent* v. *Tillson*, 140 U. S. 316, 328; *Pittsburgh, etc., R. Co.* v. *Backus*, 154 U. S. 421.

The authorities might be multiplied upon this subject. The great weight of authority supports the ruling made in *Muirhead* v. *Sands*, 111 Mich. 487.

It is contended that, the statute having provided that the tax deed shall be conclusive evidence of title in the purchaser, the act is therefore void.

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"Declaring tax titles conclusive is no new thing in legislation. * * * The legislature has repeatedly undertaken to give greater force to tax deeds than could legally be sanctioned. But the attempt, though unsuccessful, was never supposed to affect the whole tax law." Judge COOLEY in *State Tax-Law Cases*, 54 Mich. 367.

Whether the deeds in the present case are to be treated as conclusive or not is wholly unimportant. Even if that clause should be held unconstitutional, it would not render the whole act void. If the court had jurisdiction to render the decree, no irregularities prior to the decree can now be set up to defeat the deeds.

3. Section 72 of the tax law provides: "The courts may, on application, put the purchaser in possession of the premises by writs of assistance." It is the contention of counsel that this provision is unconstitutional, because it deprives the landowner of the right of trial by jury in an action of ejectment, and is in violation of section 27 of article 6 of the Constitution of this State, which provides that "the right of trial by jury shall remain." The argument is that numerous questions of jurisdiction to enter the decree may arise, and these questions may rest upon facts to be passed upon, and which are still open to attack, affecting the validity of the title.

This is not a trial of the respondent's right of possession, or of its title to the premises. Those questions were involved in the issue upon the auditor general's petition. Upon the filing of the petition for the writ of assistance, the inquiries are:

(1) Whetner the court had jurisdiction to render the decree.

(2) Whether all the steps required by the statute have been taken in making the sale, filing the report of sale, etc.

(3) Whether the time for redemption has expired.

These are questions which may be determined by the chancery court in the tax proceedings. The provision of the statute for the issuance of a writ of assistance is the means provided by the legislature to enable the court to

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carry its decree into execution. The calling of a jury to determine the questions arising under this application would be but an idle ceremony. Where the court of chancery has power to decree, it has power to carry its decree into effectual execution. In cases of mortgage foreclosures it is the general rule that the purchaser of the lands sold under the decree is entitled to be put into possession by the court entering the decree. It was said in *Ludlow* v. *Lansing*, Hopk. Ch. 232, that "to transfer the title, and leave the purchaser to another suit to obtain possession from a party whose rights have been fully decided by this court, would be useless and vexatious circuity." The object of a writ of assistance is to compel parties who are bound by a decree in foreclosure to give up the possession which the decree and sale under it estop them from further asserting. *Ramsdell* v. *Maxwell*, 32 Mich. 285. And matter set up in defense to a motion for a writ of assistance cannot be received to affect the decree determining the defendant's rights, unless the matter goes to the jurisdiction of the court in rendering the decree. *Howe* v. *Lemon*, 47 Mich. 544; *Muirhead* v. *Sands*, *supra*.

We can see no distinction between a decree rendered in the foreclosure of a mortgage and the decree in a tax proceeding, as in the present case, so far as these questions are concerned. One deprives the party of the title and right to possession the same as the other; and the rules for the enforcement of a decree in a foreclosure proceeding are applicable to the enforcement of a decree in a tax proceeding. The respondent has had its day in court in this equitable proceeding. It is well settled in foreclosure proceedings that the purchaser of the premises under the decree cannot be compelled to resort to a court of law to obtain possession. In *Kershaw* v. *Thompson*, 4 Johns. Ch. 609, it appears that a decree of sale was made that did not contain any order that the purchaser be let into possession. An application for a writ of assistance was made, and the defense was specifically raised th _ the

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purchaser under the decree should be left to his remedy by ejectment. Mr. Chancellor Kent said:

"If it was to be understood that, after a decree and sale of mortgaged premises, the mortgagor or other party to the suit, or, perhaps, those who have been let into the possession by the mortgagor *pendente lite*, could withhold the possession in defiance of the authority of this court, and compel the purchaser to resort to a court of law, I apprehend that the delay and expense and inconvenience of such a course of proceeding would greatly impair the value and diminish the results of sales under a decree. * * * It seems to be absurd to require the assistance of two distinct and separate jurisdictions for one and the same remedy, viz., the foreclosure and possession of the forfeited pledge. * * * It may be safely laid down as a general rule that the power to apply the remedy is co-extensive with the jurisdiction over the subject-matter. A bill to foreclose the equity of redemption is a suit concerning the realty, and *in rem;* and the power that can dispose of the fee must control the possession."

This is the rule of all the cases in foreclosure proceedings. *Montgomery* v. *Tutt*, 11 Cal. 190; *Terrell* v. *Allison*, 21 Wall. 289; *Schenck* v. *Conover*, 13 N. J. Eq. 220 (78 Am. Dec. 95); *Stanley* v. *Sullivan*, 71 Wis. 585 (5 Am. St. Rep. 245).

But counsel contend that our Constitution guarantees the right of trial by jury, and that, therefore, the respondent was entitled to a trial in an action of ejectment, where a jury might be called. This question was discussed by Mr. Justice COOLEY in the *State Tax-Law Cases, supra.* It was there said:

"This case is a proceeding in equity instituted by the State to enforce against a parcel of land a lien which it claims for taxes, and it is a different proceeding altogether from any which was known to our jurisprudence in 1850. It is a new proceeding, and therefore, if jury trial cannot be had in it, that method of trial is not cut off, but is simply not given. There is nothing in the Constitution which renders it necessary to provide for jury trial in new cases. The constitutional provision is, 'The right of trial by jury shall remain,' by which we are to understand

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merely that it is retained for the cases in which it existed before. * * * But it may be said, and is said, that, in the event of a sale taking place and of a deed being given in these proceedings, jury trial would be an idle ceremony, because the act makes the deed conclusive evidence of title in the purchaser. In response to this it may well be replied—and the experience of every practicing lawyer will confirm it—that jury trial in cases involving the validity of a tax deed was always an absurdity. * * * Such cases are therefore either tried by the court without a jury, or, if a jury is called, the court, by his charge, determines what the verdict should be, and the jury merely bow their heads in assent. Jury trial, therefore, as a great constitutional privilege in such cases, if not calculated to provoke a smile as an absurdity, is certainly without any claims upon courts for the straining of a point for its protection. * * * It is often said that a court of chancery is not the proper tribunal for the trial of titles to land, and perhaps a notion has arisen from this that there is some constitutional impediment. If it were the fact, it would be immaterial in this case, for this, as we have already said more than once, is not a case in which titles are to be tried, or in which a title is even disputed. But the notion that the chancery court cannot try titles to land under proper legislative authority is quite baseless. My Brother CAMPBELL showed this very satisfactorily in *Hoffman* v. *Beard*, 22 Mich. 59, 69. That case was a suit in partition, and the land was held adversely to the complainant."

In *Ward* v. *Farwell*, 97 Ill. 593, the constitutionality of a statute allowing a receiver of an insurance company to file a bill to assess the stockholders was attacked because it did not provide for a trial by jury. The court cited the provision in regard to jury trial, as contained in the several constitutions that have been in force in Illinois, and said:

"The constitution of 1870, by which the question under consideration must be determined, guarantees the right of trial by a jury to all persons, whether natural or artificial, to the same extent and in the same manner it had been enjoyed previous to its adoption. The provisions of the previous constitutions above cited were never regarded, so far as we are advised, as being mandatory upon courts

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of equity, if, indeed, as having any application to proceedings in those courts. And it was, and still is, under the present constitution, the constant practice of those courts to decide, without the intervention of a jury, important questions of fact involving property rights, without at all consulting the wishes of the parties to the proceeding; whereas, if the same questions were to arise in a common-law action, either of the parties to the suit would have the constitutional right to have them passed upon by a jury. And the right of a court of equity to pass upon questions of this kind does not depend upon the fact that the cause of action was one of equitable cognizance prior to the adoption of the existing constitution. It is sufficient if it is one in fact, without regard to when it became so or was first recognized by the courts as such. It is a fact well understood by all who are familiar with the history of courts of equity that their jurisdiction, from the earliest times to the present, has been of a gradual and constant growth. Originally, the subjects over which they assumed jurisdiction were comparatively few; but, in process of time, they have gradually increased to an almost indefinite extent. Nor is it important whether this gradual growth in their jurisdiction is attributable to direct legislation, or to the enlarged views of the eminent chancellors who have presided over and shed so much luster upon those courts. It is sufficient if the subject-matter of the suit is one of equitable cognizance, without regard to when it first became so or was recognized as such; and in all such cases, except where some statute has otherwise expressly provided, the court may, if it thinks proper to do so, pass upon all questions of fact involved in the controversy without the intervention of a jury. Of course it would not be competent for the legislature to defeat the right of trial by a jury in common-law cases by simply declaring they might be tried in courts of chancery, and that the proceedings therein should conform to the proceedings in chancery causes. This would simply be an attempted evasion of the provisions of the constitution. Where a new class of cases are, by legislative action, directed to be tried as chancery causes, it must appear that, when tested by the general principles of equity, they are of an equitable character, and can be more appropriately tried in a court of equity than in a court of law. And if of this character, when brought in a court of equity, they stand upon the same footing with other

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causes, and the court will have the right, as in other cases, to determine all questions of fact without submitting them to a jury. * * * The constitutional provisions we have cited were designed simply to secure the right of trial by jury in all tribunals exercising common-law jurisdiction as it had theretofore been enjoyed. It was not intended to confer the right in any class of cases where it had not previously existed. Nor was it intended to introduce it into special summary jurisdictions unknown to the common law, and which do not provide for that mode of trial,"—citing *Johnson* v. *Railroad Co.*, 23 Ill. 203; Sedg. Stat. & Const. Law, 549; *Ross* v. *Irving*, 14 Ill. 171.

Some question is raised over the sufficiency of demand of possession of the premises. We think the testimony conclusively shows that a proper demand was made upon the proper agents of the respondent who were in possession of the premises. The deeds were produced and exhibited to the parties in possession, who refused to surrender.

The court below ordered the writ of assistance to issue, and, we think, very properly, under the showing made. That order must be affirmed, with costs.

The other Justices concurred.

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SANGER *v.* TOWNSHIP BOARD OF BROWNSTOWN.

1. HIGHWAYS—LOCATION—APPEAL TO TOWNSHIP BOARD.
   The township board has no jurisdiction to hear an appeal from an order of the commissioner of highways laying out a highway until the notices required by the statute are properly served.

2. SAME—INSUFFICIENT NOTICE—EFFECT ON APPEAL.
   Where persons aggrieved by the determination of the highway commissioner have duly filed their claim of appeal, and have appeared and prosecuted the same at the time and place designated in the notice served upon them by the township clerk, they have done all that the statute requires of them, and they cannot be deprived of the benefits of their appeal by the failure of the clerk to serve notice upon the commissioner, but are entitled, in case the proceedings on the appeal are set aside for that reason, to another hearing after proper notice.

Error to Wayne (two cases); Steere and Hosmer, JJ. Submitted June 14, 1898. Decided July 18, 1898.

Petition by John P. Sanger and others for the opening of a highway in Brownstown township. The township board, upon appeal, reversed the finding of the commissioner that the proposed highway was a public necessity, and Sanger removed the proceedings to the circuit court by *certiorari*, where the decision of the board was set aside, but "without prejudice to prior proceedings." Meanwhile the board again decided against the necessity of the highway, and, upon a second writ of *certiorari* to the circuit court, that decision was affirmed. Sanger brings error from both judgments. Affirmed.

John W. McGrath, for appellant.

Wisner & Harvey, for appellee.

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HOOKER, J. Between Lake Erie and a road running parallel with the shore, known as the "River Turnpike," there are four parcels of land upon the south of the projected highway involved in this proceeding, and one to the north of it. Upon the south, Sanger, the plaintiff in *certiorari*, owns 80 acres of land bordering upon the lake, which is used for summer-resort purposes. West of him are two 80-acre parcels, owned by Wyman, and west of these a parcel owned by Quick. On the north side Wyman owns the land from the highway to the lake. On January 25, 1897, a petition, signed by 18 freeholders of the township, was presented to the highway commissioner, praying for a highway across the lands of Quick and Wyman, to the line of Sanger's land. A remonstrance, signed by 56 freeholders of the township, was presented. The commissioner filed a report that he had heard the proofs of the parties interested, and determined that said highway was a necessary public improvement, and awarded damages to Wyman and Quick, respectively. No plat accompanied the report. Wyman and Quick filed claims of appeal to the township board, with the township clerk, and a meeting of the township board was called for February 27th, to consider the appeals. All members of the township board were present; also Wyman and Quick. Sanger was also there, and was examined on oath. No objection to the proceedings was made on his behalf. The highway commissioner was not present, but the township clerk reported that he had served proper notices of hearing. Upon the hearing, the township board determined that the proposed highway was unnecessary. A writ of *certiorari* was thereupon taken to the circuit court by Sanger. The allegations of error were: (1) That no notice of the time and place of meeting to consider the appeals, provided by section 1302, 3 How. Stat., was given to or served upon the commissioner of highways. (2) That at the meeting of the township board no proof of such notice was presented to the board or filed with the township clerk.

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The return shows that proper notices in writing of such appeals were served by the township clerk on the appellants and the highway commissioner, by leaving the same at their respective places of residence, except that the notice served on the commissioner, "respondents are informed," did not show the time and place of hearing the appeals; and, further, that the highway commissioner was not present because, though living and being present in the village at the time the meeting was held, and intending to be present thereat, he was requested by the plaintiff in *certiorari* to remain away, so that, if the decision of the board should be unfavorable to the opening of the highway, it would be overruled, because there was no proof of service of notices of hearing on file. This statement was based upon affidavits of the supervisor and highway commissioner, which accompanied the return and to which it referred. The cause was heard in the Wayne circuit court on March 31st, and the proceedings of the township board were "set aside for want of jurisdiction, the decision to be without prejudice to prior proceedings." The cause was then removed to this court by writ of error, by Sanger, whose counsel contends that the decision of the circuit court was erroneous, in so far as it declared the reversal of the proceedings of the township board to be without prejudice to the earlier proceedings.

Meantime the township clerk, treating the proceedings as a nullity, called a meeting of the township board for March 31st to consider said appeals, and caused notices thereof to be duly served, and on March 31st the township board met, and heard and determined said appeals, reversing the action of the highway commissioner, as before. On *certiorari* the Wayne circuit court affirmed this proceeding, and it is now before us upon a second writ of error, issued on the application of Sanger.

The two questions argued are:

1. Whether the first order of the circuit court was erroneous in attempting to declare that the reversal of the decision of the township board was without prejudice to the prior proceedings.

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2. Whether the second decision of the township board can stand.

Inasmuch as the only appeal taken from the first order of the circuit court was taken by Sanger, we have no occasion to review the regularity of the first hearing before the township board. Neither party is in a position to claim that it was valid. Sanger has admitted it by claiming that it was not regular. The others are concluded by the judgment, from which they have not appealed. This question, then, resolves itself into the effect of the void action by the township board upon appellants' rights. They had no further responsibility than to duly make and file their claims of appeal, and appear and prosecute them at such time and place as the board should direct and give them notice of. The failure to give any, or an adequate, notice, was no fault of theirs. But it is contended that the board acquired jurisdiction by the appointment of a time and place, and by meeting at said time and place and hearing the appeals, notwithstanding the fact that the clerk omitted or neglected to give the statutory notice, and that the board might have cured the defect by an adjournment, with direction to the clerk to serve a notice for the adjourned day, and, failing to do this, they would lose jurisdiction. We are cited to cases of loss of jurisdiction by justices of the peace through failure to keep the proceedings alive by proper adjournments, as supporting this contention. This view seems at variance with the decisions in the following cases: In *Tefft* v. *Hamtramck Township Board*, 38 Mich. 558, it was said that "notification was a prerequisite to their right to proceed and make the order, and the validity of the order cannot be presupposed for the purpose of proving by its recital that a preliminary step, essential to its validity, was actually taken." In *Brazee* v. *Raymond*, 59 Mich. 548, which was a similar case, it was said: "The notice was a prerequisite to the right of the board to proceed."

We are of the opinion that the appeal was properly taken, and that, until the proper notices were served, the

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township board had no jurisdiction to hear the appeal, notwithstanding the appointment of a day for hearing by the clerk, and that any attempt to do so was futile and a nullity. The action of the board being void, we see no reason why a new day might not be set and notices served. Had the clerk refused to appoint a day or serve notices in the first instance, *mandamus* would have compelled it, even at the instance of the appellees, who, if the appeal had the effect to vacate the commissioner's decision, might have no other remedy. Would this right be cut off by an unlawful assumption of jurisdiction? We think there is no good reason for denying the right to serve a new notice, and that it is supported by the view hitherto expressed in relation to the essentials of jurisdiction. As to the first order, we think it a proper, though unnecessary, expression of the circuit court upon the *status* of the prior proceedings.

Both judgments are affirmed, with costs.

The other Justices concurred.

WRIGHT v. VILLAGE OF PORTLAND.

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MUNICIPAL CORPORATIONS—PRESENTATION OF CLAIMS—VERIFICATION—WAIVER.

A claim for injury to land having been presented to a village council at the request of one of the trustees, a committee was appointed to investigate it, who caused a survey to be made for the purpose of ascertaining the amount of damages, and the council referred the matter to the president for settlement. At his request, the claimant appeared before him, and tried to make an adjustment, objection being made to the amount of the claim. No objection was raised that it was not verified and itemized, as provided by Act No. 3, Pub. Acts 1895, chap. 5, § 7, until the village filed its plea in a suit to enforce the claim. *Held*, that it was a question for the jury as to whether the council had waived the defense.

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Error to Ionia; Davis, J. Submitted June 14, 1898. Decided July 18, 1898.

Case by Guy Wright and Cornelius Franks, infants, against the village of Portland, for injury to land. From a judgment for defendant on verdict directed by the court, plaintiffs bring error. Reversed.

McGarry & Nichols, for appellants.

R. A. & W. E. Hawley, for appellee.

MOORE, J. The plaintiffs sued defendant to recover damages for injury done to their lands by seepage from a pond owned by defendant, and for entering upon the land of plaintiffs, and removing therefrom about 900 yards of gravel. Defendant pleaded the general issue, and gave notice, by way of defense, that a verified and itemized claim had not been presented to the village council for audit and allowance, as required by section 7, chap. 5, Act No. 3, Pub. Acts 1895, under which act the village is incorporated. At the trial, objection was made to the introduction of any testimony, for the reason that the declaration did not show the claim had been presented as above stated. The objection was sustained. The plaintiffs then asked leave to amend the declaration so as to show that plaintiffs had presented their claim to the village council; that it was presented at the request of one of the trustees, and was acted upon by the council; that a committee was appointed to investigate the claim, who caused a survey to be made, for the purpose of ascertaining the amount of damages; that the council then referred the matter to the president of the council, to settle the claim, and that at his request the plaintiffs appeared before him, and tried to make an adjustment; that the only objection to the payment of the claim was to the amount, and not because it was not verified or certified to, as required by the statute; that suit was brought, and that it was not until the plea was filed that any notice was given that objection

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was made to the claim as presented for the reason it was not properly itemized and verified. Counsel offered to introduce proof to sustain the allegations of the declaration when thus amended. The court refused to permit the amendment, not upon the ground of exercising his discretion, but put it upon the ground that the council had no authority to delegate the settlement to its president, and that the declaration as amended would not state a cause of action, and, if sustained by proofs, plaintiffs could not recover.

The only question necessary to be decided is: Did the offered proof raise a question of waiver, which ought to have been submitted to the jury? It is insisted on the part of the village that the village council cannot waive the provisions of the statute. It is said: "The right of waiver is subject to the control of public policy, which cannot be set aside or contravened by any arrangement or agreement of the parties, however expressed,"—citing 28 Am. & Eng. Enc. Law, 533. A reference to this authority shows what the writer had in mind when we read what follows: "Thus, an agreement waiving the defense of usury is void, and so also is the ratification of a forgery, or a waiver of a violation of Sunday laws," etc. We do not see how any question of public policy is involved here, so as to affect the question of waiver. Had this claim been allowed and paid, we do not think it could be said an illegal claim or one contrary to public policy had been adjusted, simply because the claim was not verified. This requirement of the statute is for the benefit of the village, and is a matter which may be used by it by way of defense. This court has construed a similar statute several times. In *Germaine* v. *City of Muskegon*, 105 Mich. 213, where the claim was not rejected for the reason it was not properly verified, it was said the defect was therefore waived. In *Canfield* v. *City of Jackson*, 112 Mich. 120, the defense was not set up until the case was tried. It was then raised in an application for a new trial. It was held that was too late. The case

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of *Griswold* v. *City of Ludington*, 116 Mich. 401, is a case much like this. The claim was presented. The council did not do as much nor take as formal action in relation to it as counsel offered to prove was done in this case. The claim was not verified. The court said:

"A waiver is a mixed question of law and fact, and each case must necessarily depend much upon its own peculiar circumstances and surroundings. It is a question for the court to determine whether there is any evidence tending to show a waiver; but, when there is any evidence, the jury must determine what the intent of the party was, as the question of waiver is usually one of intent, as indicated by the acts and declarations of the party."

It was held the council might waive the verification of the claim, and the court should have submitted the question to the jury whether it had done so or not.

In this case, if counsel could show what he offered to show, the question should have been submitted to the jury to decide whether there was a waiver on the part of the council.

Judgment is reversed, and a new trial ordered.

The other Justices concurred.

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HUGHES v. JORDAN.

1. TAXES—COLLECTION—CONCLUSIVENESS OF DECREE.

A valid decree for the sale of land delinquent for taxes forecloses all questions as to the regularity of the prior proceedings; and hence an objection cannot afterwards be raised that no demand for the payment of the tax was made by the township treasurer upon the person assessed, nor any effort made to collect the same from his personal property, as required by the statute.

2. SAME—STATE LANDS—PURCHASE PRICE.

Under section 84 of the tax law of 1893 (Act No. 206, Pub. Acts 1893), providing that any person may purchase State tax land by paying the amount for which the same was bid off to the State, with interest thereon, together with the other taxes "remaining a lien" on the land at the time of purchase, a deed of State land, issued without the payment of a tax for a subsequent year, which was a lien on the land at the time of purchase, is void, even though such tax had not yet been returned by the collecting officer.

3. VENDOR AND PURCHASER—QUITCLAIM DEED.

A purchaser by quitclaim deed obtains no better title than that held by his grantor.

Appeal from Muskegon; Russell, J. Submitted February 2, 1898. Decided July 18, 1898.

Petition by Edward Hughes against Patrick Jordan for a writ of assistance. From an order granting the writ, respondent appeals. Reversed.

Stephen H. Clink, for petitioner.

M. C. Kelley and *Brown & Adams*, for respondent.

HOOKER, J. Hughes, the petitioner, is the purchaser of the premises in controversy from Clink, who bought them from the State, said lands having been bid in for the

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State for the tax of 1893. The auditor's deed was issued to Clink on July 27, 1897, shortly before he deeded to Hughes. On September 20, 1897, application was made by Hughes to the court which rendered the decree for a writ of assistance, to enable him to obtain possession. The defendant, Jordan, purchased the lands from Kelley, by contract dated April 2, 1897. Kelley had possession from April, 1890, under a contract. The defendant alleged in his answer, and offered to prove, that, after the issue of the deed from the auditor general to Clink, Kelley tendered an amount equal to the taxes of 1893 and 1896 to the auditor general, and demanded a deed; that no demand for payment of the tax of 1893 was made by the township treasurer of Kelley, as provided by section 46 of the tax law of 1893 (Act No. 206), although said treasurer knew that Kelley claimed to own the land, and had paid the tax for 1892 to him; that no attempt was made by the township treasurer to collect the tax from the personal property of said Kelley, which might have been done; and that the deed was void for the further reason that it issued without payment of the tax of 1896, which was at that time a lien upon the premises, and which is still unpaid. The answer concluded with a prayer "that the decree be reopened and vacated, and a rehearing granted, and defendant allowed to show what portion of the tax for which the land was sold is illegal and void, and that the sale and deed be declared void, and defendant be allowed to pay such taxes as are legal." The court did not permit such proof to be made, denied a rehearing, and ordered the writ of assistance to issue as prayed.

Most of the questions raised relate to irregularities anterior to the decree under which the State purchased the land, and these are covered by the recent cases of *Cole* v. *Shelp*, 98 Mich. 58; *Muirhead* v. *Sands*, 111 Mich. 487; *Hilton* v. *Dumphey*, 113 Mich. 241; *Auditor General* v. *Hutchinson*, Id. 245; and *Auditor General* v. *Sparrow*, 116 Mich. 574. The following questions are, however, open upon this record, viz.:

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1. Whether the circuit court had jurisdiction in the tax proceedings under which the State purchased.
2. Whether the proceedings subsequent to decree were void.
3. Whether the purchase by Clink of the State's title was accompanied by payment of the tax of 1896, and, if not, whether that fact rendered the deed void.
4. Whether a writ of assistance may be issued in case the petitioner's title is sustained.
5. Whether it should be denied, and a rehearing in the original tax case granted.

We may dispose of the first of these questions by saying that there is nothing in the testimony offered which tended to show a want of jurisdiction in the original proceedings, the questions presented being within the principles recognized in the cases hereinbefore cited.

Whether Clink should have paid the tax of 1896 when he bought the State title involves a question of fact. It does not appear when the money was paid and title purchased, though from the defendant's brief we infer that it was some time before the deed was issued, and perhaps before the auditor general was advised that the land was returned to the county treasurer as delinquent, and possibly before such return. Inasmuch, however, as the answer alleges a violation of section 84 in that regard, the proof should have been taken, unless we are to say that the failure to pay such tax would not render the deed void. It may be said that, the title being in the State, others have no interest in the amount received by the State for its title, and that subsequent purchasers for value may rely upon the title conveyed by the State. Here, however, the petitioner relies upon a quitclaim deed, and is therefore on no better footing than his grantor; and, as will be seen by section 85, the owner may be interested in having subsequent taxes paid, and it may also happen that he has himself applied to purchase the lands, offering to pay all taxes and charges required by law to be paid by the purchaser. That is said to have been done in this case.

The auditor general has no authority, under section 84,

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to sell and deed State lands, except upon receiving the price required by law, and this the purchaser is bound to know. The taxes become a lien upon the land early in December,—a fact that is known to the auditor general, and of which the purchaser must take notice. Before the auditor general is authorized to part with the title of the State, he must be paid all taxes which remain a lien upon the land. After the time that taxes have become a lien, both purchaser and auditor general are aware that taxes have become due and payable which have not been returned. The purchaser can procure and the auditor general may require evidence that they have been paid, if such is the fact. It may be said that this imposes onerous burdens upon the purchaser; but they are not so serious as to justify the disregard of an unambiguous requirement of the statute (section 84). If this was not done, and such taxes remained a lien on the land when the deed was made, the title was not conveyed to Clink, and the right of others who might comply with the law to purchase was not cut off. As we have no means of determining the fact (proof being excluded upon this point), the order must be reversed, and the cause remanded for a rehearing, with costs to the appellant.

The other Justices concurred.

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DETROIT FIRE & MARINE INSURANCE CO. v. WOOD.

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1. TAX SALES—EFFECT OF CONFIRMATION—PURCHASE BY STATE—VALIDITY.

A tax sale to the State, which has been reported to the court and confirmed, will not be set aside because the land was struck off to the State on the first day of the sale, in violation of a provision of section 70 of the tax law of 1893 (Act No. 206, Pub. Acts 1893), even if the further provision of said section, that no sale shall be set aside after confirmation, except where the taxes were paid or the property was exempt from taxation, is an unlawful restriction on the general exercise of equitable powers.

2. SAME—PROCEDURE—DATE OF SALE.

It seems that the further provision of said section, that "the sale and all proceedings thereon shall be the same as if made on the first day fixed therefor," was designed to fix a time from which the redemption period should be computed, and does not authorize the dating of certificates and reports incident to the proceedings otherwise than in accordance with the facts.

3. SAME—REPORT TO AUDITOR GENERAL—TIME FOR MAKING.

Under the provision of said section that, as soon as sales are confirmed, the county treasurer shall report the same to the auditor general, the treasurer is entitled to a reasonable time in which to make his report; and 10 days is not an unreasonable time to take for that purpose.

4. SAME—INEFFECTUAL EFFORT TO REDEEM—RIGHTS OF OWNER—STATE LANDS—PURCHASE PRICE.

The owner of land bid in by the State for taxes, after the expiration of the period for redemption, paid to the county treasurer a sum supposed to be sufficient to redeem from the sale and to pay the taxes of a subsequent year. The auditor general, when the transaction was reported to him, rejected the redemption certificate, but did not refund the subsequent taxes, and afterwards sold the land to a third person on payment of the amount of the State's bid. *Held*, that he should have treated the attempt to redeem and to pay subsequent taxes as a single transaction, and wholly unavailing, and should have required the purchaser to pay the subsequent

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taxes, as provided by section 84 of the tax law, failing which the deed issued to him was void, under *Hughes* v. *Jordan*, *ante*, 27.

Appeal from Ingham; Person, J. Submitted February 2, 1898. Decided July 18, 1898.

Petition by the Detroit Fire & Marine Insurance Company against Eugene B. Wood and the auditor general to set aside a tax deed, and to apply certain redemption money to the purchase of the land. From a decree dismissing the petition, petitioner appeals. Reversed.

Moore & Goff (*Edward Cahill*, of counsel), for petitioner.

Charles W. Nichols (*A. A. Ellis*, of counsel), for defendant Wood.

MONTGOMERY, J. March 16, 1891, Frank S. Bagg and Eva Bagg mortgaged to the Detroit Fire & Marine Insurance Company the parcels of land described as situated in the city of Lansing, county of Ingham, and State of Michigan, and described as the "west ninety-nine (99) feet of lot number four (4), and the east eleven (11) feet of lot number five (5), of block number one hundred and four (104), of the city of Lansing." Said mortgage was foreclosed, and the petitioner (mortgagee) became the owner of the premises, April 2, 1895. Under date of March 27, 1895, H. J. Bond, treasurer of Ingham county, where the lands aforesaid are situated, wrote the following letter of information to W. A. Moore, who was president of the petitioner corporation, in response to an inquiry asking for a statement of the unpaid taxes for 1891 and 1892:

"County Treasurer, Ingham County, H. J. Bond, Treasurer.

"MASON, MICH., March 27, 1895.

"*Dear Sir:* Inclosed please find statement of unpaid taxes as requested, interest computed for payment. Subdivision of section: West three-fifths lot 4, and east 11

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feet of lots 5 and 6, block 104, tax for 1891 and 1892, $342.60. The above is the amount if paid this month or next. Yours respectfully,

"H. J. BOND, Co. Tr."

And again wrote Mr. Moore, under date of April 8, 1895:

"County Treasurer's Office, H. J. Bond, Treasurer.
"MASON, MICH., April 8, 1895.

"W. A. MOORE,
"Detroit, Mich.

"*Dear Sir:* You have a complete statement from me of all uncollected taxes against the property in question, and after property is sold for taxes you cannot redeem the State and county without redeeming the whole tax. I send you statements of amount required to pay taxes for the several years, and can't see how can make it any plainer. Yours respectfully,

"H. J. BOND, Co. Tr."

Thereupon Mr. Moore sent to Mr. Bond the sum of $311.50, which was the amount stated to be necessary to redeem the lands of the petitioner for taxes for 1891 and 1892, and received a letter from the county treasurer inclosing redemption receipts. The letter of the county treasurer is as follows:

"County Treasurer's Office, H. J. Bond, Treasurer.
"MASON, MICH., April 10, 1895.

"W. A. MOORE,
"Detroit, Mich.

"*Dear Sir:* Inclosed please find receipts for redemption of '91 and '92 taxes. The city treasurer of Lansing has not made his returns to me yet for the 1894 taxes.

"Yours respectfully,
"H. J. BOND, Co. Tr."

The certificate of redemption for taxes of 1891 was as follows:

"STATE BID.

"County Treasurer's Redemption Certificate.—I hereby certify that the sums stated below are due for the redemption of the following described tracts of land, sold for taxes assessed in the county of Ingham for the year 1891: Sales book number 54. Description, west 99 feet lot 4,

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and east 11 feet lot 5, of block 104, city of Lansing. State tax, $10.35; interest on State tax, $1.44; collection fee, $3.60; expense, $0.68; county tax, $15.55; interest on county tax, $2.18; other taxes, $64.20; interest on other taxes, $8.97; amount of bid, $106.97; total bids, $106.97; interest from December 3, 1894, to April 10, 1895, five months, at eight per cent. per annum, $3.53; aggregate, $110.50.

"Given under my hand, this 10th day of April, A. D. 1895.

"H. J. BOND,
"County Treasurer.

"County Treasurer's Office, Mason, Mich., April 10, 1895.

"$110.50. Received of William A. Moore, of Detroit, the sum of $110.50, in full of the above.

"H. J. BOND, Co. Tr.

"Countersigned: JAMES BLACKMORE,
"County Clerk."

The certificate of redemption for taxes of 1892 was as follows:

"STATE BID.

"No. 214. County Treasurer's Redemption Certificate. —I hereby certify that the sum stated below is due for the redemption of the following described tracts of land, sold for taxes assessed in the county of Ingham for the year 1892: Sales book No. 103. Description, W. 99 ft. lot 4, and E. 11 feet lot 5, block 104, city of Lansing. State tax, $6.67; interest on State tax, $0.94; collection fee, $6.57; expenses, $0.64; county tax, $9.63; interest on county tax, $1.35; other taxes, $148; interest on other taxes, $20.72; amount of bid, $194.52; total bids, $194.52; interest from December 3, 1894, to April 10, 1895, five months, at 8 per cent. per annum, $6.48; aggregate, $201.00.

"Given under my hand, this 10th day of April, A. D. 1895.

"H. J. BOND,
"County Treasurer.

"County Treasurer's Office, Mason, Mich., April 10, 1895.

"$201.00. Received of William A. Moore, of Detroit,

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the sum of two hundred one dollars and —— cents, in full of the above.

"H. J. BOND,
"County Treasurer.

"Countersigned: JAMES BLACKMORE,
"County Clerk."

The county treasurer made an entry on the tax record for 1893 immediately after the description of the premises sold:

"William A. Moore, Detroit, Michigan, redeemed west 99 feet lot 4, and east 11 feet lot 5, block 104, $110.50, April 10, 1895."

A triplicate of the redemption certificates for taxes of 1891 and 1892 was sent to the auditor general by the county clerk about May 1, 1895. The following copy of a letter of the auditor general was offered in evidence:

"A. J. P. June 20, 1895.
"INGHAM COUNTY TREASURER,
"Mason, Mich.

"*Dear Sir:* We return herewith redemption certificate number 267. The description contained therein is not subject to redemption, but is held by the State, and is subject to sale as State tax land.

"Very respectfully,
"STANLEY W. TURNER,
"Auditor General."

This letter of the auditor general was not received by the county treasurer. The first that the county treasurer knew that the auditor general would not accept the redemption certificate was near August 20, 1896 (cannot give exact date), when defendant Wood came to his office at Mason, Mich. He was surprised, and wrote W. A. Moore as soon as Wood went away. About August 20, 1896, defendant Wood went to the office of H. J. Bond, county treasurer, at Mason, and wanted to look at the tax record for the sales of 1893 (taxes of 1891). After looking at the entry, the county treasurer testified that he said:

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"I have just made application to pay that at the auditor general's office; but there is no harm done yet. I see it is paid here, and, when I go back, I will withdraw my money."

At that conversation defendant Wood told the county treasurer he had not received his deed. Defendant Wood testified that he said: "If I am obliged to, of course I will have to take my money back."

The certificate to the auditor general was dated December 4, 1893, which was the day for the sales to commence, being the first Monday in December.

On the 21st of August, 1896, Wood received a deed of the land from the auditor general, having applied for the same on August 11, 1896. This petition was filed to have the deed set aside, and to have the money remitted by Mr. Moore to the county treasurer applied towards a redemption or purchase of the land by the original owner, the insurance company. Three grounds are urged: *First*, it is claimed that the proceedings are irregular, in that it does not appear by the report of sale that the lands were bid off to the State at a time when the county treasurer had the right to make sale to the State; *second*, that the report of sale was not filed within the time required by law; and, *third*, that the transaction of the attempted redemption should be treated as an application to purchase.

1. The report to the auditor general of the sale of the land is dated December 4, 1893, which was the first day of sale. Section 70 of the tax law (Act No. 206, Pub. Acts 1893) provides that,—

"If any parcel of land cannot be sold for taxes, interest, and charges, such parcel shall be passed over for the time being, and shall on the succeeding day, or before the close of the sale, be re-offered; and if on such second offer, or during such sale, the same cannot be sold for the amount aforesaid, the county treasurer shall bid off the same in the name of the State."

And it is urged that the date of the certificate as of the first day of the sale negatives any presumption that this

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provision of the statute was complied with. Counsel for defendant call attention to a clause of the same section providing that "the sale and all proceedings thereon shall be the same as if made on the first day fixed therefor," and urge that this provision justifies dating all the sales as of the first day. There is force in the petitioner's contention, and it is doubtful if the provision last quoted was intended to authorize a dating of the proceedings not according with the facts. The chief purpose of this provision was, as we construe it, to fix a time from which the year of redemption provided in section 74 will begin to run. But, however this may be, the sale was reported to the court, and confirmed. Section 70 provides that no sale shall be set aside after confirmation, except in cases where the taxes were paid, or the property was exempt from taxation. Counsel for the petitioner raise the question whether the general exercise of equity powers can be legitimately restricted by such a provision. We need not affirm or deny the legislative power in the premises. We think the irregularity ought not to avail after confirmation, even if the power of the court is not restricted by this provision. The decree and sale under it are ordinarily final, and, if the petitioner has in this case been subjected to any wrong, it does not arise out of any irregularity attending the sale.

2. Section 70 of the law provides as follows: "As soon as sales are confirmed, the county treasurer shall make full reports of the same to the auditor general." The report was received at the auditor general's office January 10, 1894, some 10 days after the sale stood confirmed. No precise time is fixed for making this report. A reasonable time must of necessity be allowed for making this report, and we think the time taken in the present case not unreasonable.

3. The main question discussed by counsel in this case is not free from difficulty. The payment made by Mr. Moore to the county treasurer, and by him forwarded and credited to the auditor general, was intended to be used to

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accomplish two things: *First*, the redemption of the land from the sale for taxes of 1891; *second*, the payment of the taxes of 1892. A sum was remitted, sufficient, as was supposed, to accomplish this purpose. Both the county treasurer and Mr. Moore were mistaken as to the right to redeem from the 1893 sale. The whole transaction was reported to the auditor general, and he, without setting aside the attempt to redeem and pay the taxes of 1892, preferred to treat the payment to the county treasurer as insufficient to entitle the petitioner to a deed on the 1893 sale (as it probably was not). The result, therefore, was that not only was the intent and desire of the petitioner not accomplished, but, by treating the payments as separate transactions, the payment of the taxes of 1892 not only failed to relieve the lands of the petitioner as intended, but made it possible for Mr. Wood to become purchaser on payment of $132.27, instead of paying the whole tax due, as he would have been bound to do if the transaction between the petitioner and the county treasurer had been treated as an entirety, and the whole payment declined. The inequity of such a result is apparent. True, the county treasurer had not the right to accept redemption of the lands from the 1893 sale, and he did have the right to accept payment of the 1892 taxes; but Mr. Moore, as was well known, did not intend or attempt to pay this tax to discharge a burden resting on the lands of the State. The State, then, had the benefit of $201 of petitioner's money, which it was not entitled in equity to retain. Before Wood took his deed, he had notice of the facts sufficient to put him on inquiry; and not only is this true, but it is also true that it is only by reason that the State has made an application of the money of petitioner not intended by it that Mr. Wood was enabled to obtain a deed of the land for the small sum paid. We think it is only equitable to hold that the auditor general should have treated the effort of Mr. Moore as wholly unavailing, and that he should have required payment of the taxes of 1892 as a condition to

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deeding the lands to Wood. Wood, having paid only a portion of the amount due, was not entitled to a deed. See *Hughes* v. *Jordan*, *ante*, 27.

The decree will be reversed, and the deed to Wood set aside, on payment of the amount paid by him, with interest.

The other Justices concurred.

SULLIVAN *v.* McGRAW.

SURGEONS—OPERATION ON WRONG LIMB—NEGLIGENCE—QUESTION FOR JURY.

Plaintiff, who had treated with defendant, a physician and surgeon, for a disease affecting particularly his right leg, upon defendant's advice, went to the hospital for an operation. Under plaintiff's directions, the right leg was prepared by a nurse, and he was placed under the influence of chloroform. Defendant, believing the wrong leg had been prepared by mistake, asked plaintiff's brother which leg plaintiff wished operated on. The brother, being unable to tell, requested defendant to wait until he could telephone plaintiff's family, which defendant consented to do. While the brother was at the telephone, plaintiff's father arrived, and said that the left leg was the one, and defendant proceeded to operate on that leg. There was evidence that the right leg was discolored and inflamed, while the left one was not. *Held*, that the question of defendant's negligence was for the jury.

Error to Wayne; Carpenter, J. Submitted June 14, 1898. Decided July 18, 1898.

Case by James P. Sullivan against Theodore A. McGraw, a surgeon, for malpractice. From a judgment for defendant on verdict directed by the court, plaintiff brings error. Reversed.

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Frank C. Cook and *R. E. Van Syckle* (*M. J. Lehman*, of counsel), for appellant.

Keena & Lightner, for appellee.

LONG, J. This action is brought to recover damages for the wrongful operation by defendant upon the plaintiff's left leg,—the claim being that defendant was employed to operate upon the right leg; that, after putting the plaintiff under the influence of chloroform, the defendant wrongfully and carelessly operated upon the left leg, thereby causing plaintiff great pain and suffering. Defendant is a practicing physician and surgeon in the city of Detroit. The case was tried before a jury, and the court directed the verdict in favor of defendant. Plaintiff brings error.

The only question here is whether there was any evidence in the case under which it should have been submitted to the jury for their determination. It appears from plaintiff's testimony that he met the defendant professionally in October, 1896; that his right leg was then very sore. Defendant gave him some medicine from time to time during the following winter, but there seemed to be no improvement. Defendant then advised him to go to the hospital, and he would operate upon it. On Tuesday, May 11, 1897, plaintiff went to the hospital. He was then very lame, using a pair of crutches, and walking with them and using his left leg. The next morning the nurse prepared him for the operation by shaving the right leg from the knee down, as the operation was to be upon the shin bone. After it was shaved, some wash was put on and the leg bandaged. Nothing was done with the left leg. Plaintiff was then taken to the operating room of the hospital by the hospital doctor, and given chloroform. He testifies that he never told the defendant, or any one else, that he wanted his left leg operated upon; that, when he came out of the influence of the chloroform, he found his left leg was paining him, and then for the first time found that the defendant had operated upon that one; that he

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was in the hospital five weeks, and suffered great pain from that operation; that the defendant came to see him after the operation, and told him he would operate on the right leg on the following Saturday, which was done; that the right leg did not pain him after the operation on that. On his cross-examination, he testified that both legs had troubled him for several years; that in 1893 sores came out on the shin bone of the left leg; that since 1893 it had not broken out, though it had troubled him, and he took medicine for it; that it was healed, and was not bothering him, at the time of the operation, but that the right leg had continued to be sore. He was asked if the defendant had not advised his going to the hospital and having both legs operated upon, and denied that he was so advised. He further testified that a week before the operation, when the defendant advised him to go to the hospital for the operation, he showed him both legs, so that he could compare them; that there had always been an enlargement of the shin of the left leg.

The nurse testified that he prepared plaintiff for the operation; that he had a swelling on both legs, and witness asked him which leg was to be operated upon, and he said the right leg, so he prepared that; that the flesh on the right leg was a little discolored. Dr. Hackett was sworn for plaintiff, and testified that he examined his legs in February, 1897, and prescribed for the right one; that it was swollen and discolored; that it showed symptoms of inflammation, heat, redness, pain, and swelling; that there was no evidence of inflammation in the left leg, but that it appeared to be in a healthy condition. William Sullivan, a brother of plaintiff, was called, and testified that he was present at the operation; that he held plaintiff's pulse while the chloroform was being administered by Dr. Atridge; that, when plaintiff was put on the operating table, both legs were exposed to the defendant; that the defendant then said: "See here! you fellows have made a mistake; you have prepared the wrong leg for the operation;" that Dr. Van Slyke, who was present, said

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he did not think it possible, and defendant repeated, "You have prepared the wrong leg." Witness then testified:

"He asked me which he wanted operated upon. I told him I was confused, and I did not know. * * * He said he was sure it was the left one, and that they had prepared the wrong leg. He then asked Dr. Steinbrecher, who was standing there, to prepare the left leg. * * * While they were preparing it, I said, 'You better wait a minute, until I go and telephone my folks, so we will be sure.' And he asked me how long it would take. I said, 'A couple of minutes.' He said, 'All right.' So I said, 'Will you wait?' and he nodded his head yes. I called up the 'phone, and had to wait, and Dr. Troy came * * * and said, 'They are operating on his left leg.'"

The witness further testified that, a short time after the operation, the defendant went into the plaintiff's room, and asked him which leg he wanted operated upon, and plaintiff told him his right leg, and defendant then said: "Why, I thought it was the left leg. * * * You told me down stairs that it was the left leg." And plaintiff then said, "I must have been asleep." Witness further testified that the defendant spoke to the plaintiff when he was on the operating table. He told Dr. Atridge to stop giving him chloroform, and then asked plaintiff which leg he wanted operated upon, but plaintiff made no answer. He asked again, "Is it the left leg?" and plaintiff groaned a little, as though he said "Yes," but that he was entirely unconscious at the time. This was just before the witness went to the telephone.

The father of plaintiff was called as a witness, and testified that he arrived at the hospital after plaintiff had been put on the operating table; that they showed him both legs, and the defendant said, pointing to the right leg, "Is that the right leg?" "'No,' I said, 'the other leg.' I had my mind on that leg all the time. I thought Dr. McGraw could not make a mistake." Witness further testified that he did not go to the hospital at plaintiff's request; that he told him not to come.

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At the conclusion of the plaintiff's proofs, the court, at the request of counsel for defendant, directed the verdict in favor of defendant. The court stated to the jury, among other things:

"It seems to me that this case turns upon the question of whether or not the doctor was negligent in operating upon the left leg, instead of upon the right leg. If I should leave this to you, I would have to say to you, if the doctor made these inquiries, and was told by the father that that was the leg to operate upon, that would justify him. Now, there is no doubt that he did; there is nothing to leave to you on the question of negligence, it seems to me. It is earnestly insisted upon the part of plaintiff that this case does not depend upon the doctor's negligence, but does depend upon the want of consent or absence of consent upon the part of the plaintiff. I do not so understand the law. Of course, if there had been no consent at all to any operation, it would have been clearly trespass to have touched the plaintiff's person. But plaintiff had gone there for the purpose of having an operation performed upon him. To touch his person was not technically a trespass; but in this case a mistake was made in the choice of legs to be operated upon. The liability, in making that mistake, must depend upon whether or not the doctor was negligent; and, as I say, there was nothing in the case which would warrant you in finding a verdict on that theory."

There is no claim in the present case that the doctor did not have the skill and knowledge necessary for the operation. The declaration avers negligence on the part of defendant in operating upon the left, instead of the right, leg. We think the court below was not in error in saying that the only question in the case for determination was whether or not the defendant was negligent in operating upon the wrong leg. That is the averment in the declaration, and the only case which the plaintiff's proofs tended to establish. We cannot, however, agree with the court below that there was no evidence tending to establish that fact. Plaintiff had put himself under the care of the defendant, and, as he says, for the purpose of an operation upon his right leg. According to plain-

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tiff's statement, the doctor knew which leg was to be operated upon. The right leg was prepared by the nurse, under the plaintiff's direction. When in the operating room, the defendant himself disputed the fact that the leg so prepared was the one to be operated upon. He asked the brother, who says he got confused, and was unable to state, but asked time to make the inquiry by telephone, and started to do so; but the defendant, instead of waiting, operated before the brother returned. The only excuse given, so far as this record shows, is that the father came in at that moment, and directed the left leg to be operated upon. The father was not there at the plaintiff's request; on the contrary, he was told to remain at home. It may be true that the doctor might be excused for the operation upon the wrong leg if he had waited until the brother returned, and had been advised that the family said that it was the left leg to be operated upon. Perhaps that, in connection with what the father said, might show that he was in the exercise of due care, if there were no other testimony which had a tendency to show the want of such care as he should have exercised. But there is some testimony tending to show that the left leg was not discolored or inflamed, while the right leg was. In addition to this, the plaintiff testifies that, at the time the doctor advised him to go to the hospital, it was for the purpose of an operation upon the right leg, and not upon the left. The case should have been submitted to the jury for their determination whether the defendant exercised that degree of care which, under the circumstances, he was bound to exercise.

The judgment must be reversed, and a new trial granted.

MONTGOMERY, HOOKER, and MOORE, JJ., concurred. GRANT, C. J., took no part in the decision.

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YOUNGS v. PETERS.

1. TAX SALES—VALIDITY—ENROLLMENT OF DECREE.
   A tax sale is not void because made before enrollment of the decree; the general provisions of the statute and court rules in relation to enrollment not being applicable to tax proceedings.

2. SAME—REPORT TO AUDITOR GENERAL—TIME FOR MAKING.
   A report of a tax sale, made by the county treasurer to the auditor general 12 days after confirmation of the sale, is a sufficient compliance with the requirement of section 70 of Act No. 206, Pub. Acts 1893, that such report be made "as soon as the sale is confirmed."

3. SAME—CONSTITUTIONALITY OF ACT—STARE DECISIS.
   Certain objections to the constitutionality of the tax law of 1893 are overruled, upon the authority of *Ball* v. *Ridge Copper Co.*, *ante*, 7.

Appeal from Marquette; Stone, J. Submitted October 8, 1897. Decided July 18, 1898.

Petition by Clark W. Youngs against Robert Peters and others for a writ of assistance. From an order granting the writ, respondents appeal. Affirmed.

W. S. Hill (*M. J. Sherwood* and *J. E. Ball*, of counsel), for petitioner.

Clark & Pearl, for respondents.

LONG, J. Petition for writ of assistance. Petitioner became the purchaser of the lands in controversy at the annual tax sale in 1896, under a decree made in the circuit court, in chancery, for Marquette county. He petitioned for a writ of assistance; and the respondents, in answer to an order to show cause, replied:

1. That it was an attempt to eject respondents from their possession of the property without their having had

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their day in court before a jury, and in contravention of section 27 of article 6 of the Constitution of this State.

2. That the court of chancery acquired no jurisdiction to render a decree against the land, because no personal service of notice was given to the owner of the land, though he resided within said county, and that the law providing for publication of notice, and thus attempting to give the court jurisdiction, is in contravention of the fourteenth amendment to the Constitution of the United States.

3. That the decree had not been enrolled before sale.

4. That the county treasurer did not make a report of sale to the auditor general within the time prescribed by the tax law.

5. That the owner of the land had personal property from which the tax might have been collected.

On the coming in of the answer, the court below granted the order issuing the writ of assistance.

The questions raised by respondents in the first and second points above stated are fully discussed, and decided adversely to respondents' contention, in *Ball* v. *Ridge Copper Co.*, *ante*, 7.

We think the proposition that no sale could be made until after enrollment has no force. The statute prescribes a time for the sale to take place, which precludes the application of 2 How. Stat. §§ 6648, 6649. Chancery Rule No. 24 cannot overrule the tax law, which provides when the deeds may issue. See, also, *Hochgraef* v. *Hendrie*, 66 Mich. 561.

The point that the county treasurer did not make his report to the auditor general in time is decided contrary to the view of counsel in *Detroit Fire & Marine Ins. Co.* v. *Wood*, *ante*, 31. In the present case it appears that the time taken by the treasurer was not unreasonable.

The order below must be affirmed.

The other Justices concurred.

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CHRISTIAN v. SODERBERG.

1. TAX DEEDS—SETTING ASIDE—PARTIES.
   The auditor general is not a necessary party to a bill to set aside a tax deed on the ground of fraud and collusion between the purchaser and the county treasurer.

2. SAME—FRAUDULENT SALE.
   A tax deed is fraudulent and void as to a mortgagee of the premises, who purchased under foreclosure of his mortgage after the execution of the deed, where the mortgagor, in his capacity as county treasurer, fraudulently informed the mortgagee that there were no unpaid taxes on the land, and the grantee in the deed colluded with the mortgagor in the attempt to cut off the mortgagee's interest by a sale of the land for taxes.

Appeal from Muskegon; Russell, J. Submitted June 15, 1898. Decided July 18, 1898.

Bill by Antoine Christian against Sam A. Soderberg and Charles Backstrom to set aside a tax deed. From a decree dismissing the bill, complainant appeals. Reversed.

James E. Sullivan, for complainant.

Jones & Kennedy, for defendant Backstrom.

MOORE, J. Complainant filed a bill to set aside a tax title held by defendant Backstrom upon lands belonging to complainant, upon the ground of fraud and conspiracy between the two defendants. The circuit judge was of the opinion that the auditor general should have been a party to the suit, and for that reason dismissed the bill.

If the alleged fraud is established, we think the court erred in holding that the auditor general was a necessary party. This is not a proceeding to set aside a tax decree for want of jurisdiction, and the complainant in his bill offered to pay whatever taxes were unpaid.

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The record shows that the defendant Soderberg, in 1890, was the owner of the land in question. In April of that year he borrowed $1,000 of complainant, and, to secure its payment in two years, he gave a mortgage upon the land. In the mortgage it was agreed he should pay the taxes. The interest on the mortgage was paid until April, 1894. After this date no interest was paid, and no part of the principal. Foreclosure proceedings were had, which resulted in a sale of the premises to Mr. Christian in February, 1897, after which he went into possession of the property, and was in the possession of it when this bill was filed.

Mr. Soderberg became county treasurer of Muskegon county January 1, 1893, and continued to be county treasurer for four years from that date. The record shows that complainant applied to the county treasurer at his office to learn whether the taxes assessed against these lands were paid, and was assured by Mr. Soderberg that they were paid. This inquiry was made by Mr. Christian, he intending, if they were not paid, to pay them. At the same time he did pay taxes upon other lands upon which he had mortgages. Mr. Soderberg understood Mr. Christian's object in making these inquiries. As a matter of fact, the taxes had not been paid by Mr. Soderberg, but he had allowed the land to be returned for nonpayment of the taxes. In December, 1896, as county treasurer, he sold them, for the taxes of 1892, 1893, and 1894, to the defendant Backstrom.

It does not require any citation of authorities to show that these acts on the part of Soderberg were a fraud upon the complainant. It is said, however indefensible Soderberg's actions may have been, it is not shown Backstrom has done any wrong. We cannot agree with the counsel in this. We have already seen that Mr. Soderberg deceived Mr. Christian about the taxes having been paid. It appears from the record that Soderberg arranged with Mr. Anderson to buy in the property at the tax sale, and, when Anderson told him he had no money, he was

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told by Soderberg that "he [Soderberg] would see to that; that it would be paid." The property was bid off to Anderson. Mr. Christian learned of that fact, and went to Anderson, and told him he had a mortgage upon the property, and wanted to settle with him. He was told by Anderson that, if Mr. Christian had a mortgage upon the property, he would have nothing to do with it. About an hour after this, Mr. Anderson saw Soderberg, and told him about his interview with Christian, and that he would have nothing further to do with the matter, and to cancel the sale. Christian, after seeing Anderson, went to the office of the county treasurer, and asked Soderberg if the land had been sold for taxes, and was told by him it had not been. Soderberg shortly left the office, and, after considerable delay, Christian learned from Mr. Nelson, who was in charge of the books, that the land had been sold to Backstrom. It was claimed that the land had been sold to him during the noon hour of that day. The next day Christian saw Backstrom, and told him what interest he had in the lands, and they had some talk of a settlement. It was agreed that the parties should meet at the office of the county treasurer at 11 o'clock to arrange a settlement. Mr. Christian went to the place of meeting, and waited until 12 o'clock, but Backstrom did not come. He saw Backstrom the next day, and offered him $75, besides Backstrom's investment. "Then he asked me $600 for it. I told him I could not pay that. 'Well,' he said, 'I got a better title than you got.' 'Well,' says I, 'I don't know about that.' He says, 'You go and see Mr. Soderberg, and see what he would do.'" When Mr. Backstrom was a witness, he says he referred Christian to Soderberg, not because Soderberg had any interest in the title, but because Soderberg owed the debt. Mr. Backstrom says he heard on the street that Anderson had bought a piece of property at Lakeside, and that the sale was canceled. When he bought the land, Mr. Nelson, Mrs. Latimer, and Mrs. Nelson were present. He was at the court-house but

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a half hour,—perhaps not so long. He was told it was Mr. Soderberg's property. He made the purchase at the noon hour, when he was on his way to dinner. It was the only piece of property he bought at that time, and it was the first time he had bought a piece of land at a tax sale.

Without reciting the testimony further, it is sufficient to say that it is impossible to read the record, and the sequence of events, without coming to the conclusion that Mr. Backstrom and the county treasurer were acting in collusion, and their purpose was to procure the property of Mr. Christian for an inadequate price.

The decree of the court below should be reversed. A decree may be entered in favor of complainant as prayed, he to pay Mr. Backstrom the amount paid by him, with interest. Complainant is given costs of both courts.

The other Justices concurred.

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BARKWORTH *v.* PALMER.[1]

FRAUDULENT CONVEYANCES — EVIDENCE — INTENT — SUBSEQUENT CREDITORS.

The existence of an actual fraudulent intent at the time a conveyance is made is necessary to be established in order to set the conveyance aside as in fraud of subsequent creditors.

Appeal from Jackson; Peck, J. Submitted June 14, 1898. Decided July 18, 1898.

Creditors' bill by Thomas E. Barkworth and Charles A. Blair, copartners, against William H. Palmer and Mary M. Palmer. From a decree for complainants, defendants appeal. Reversed.

[1] Rehearing denied October 3, 1898.

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Thomas E. Barkworth and *Charles A. Blair*, *in pro. per.*

Forrest C. Badgley (*Richard Price*, of counsel), for defendants.

LONG, J. Complainants recovered a judgment against defendant William H. Palmer on March 30, 1895, for $226.10, and $20.50 costs. This proceeding is a judgment creditors' bill to set aside certain deeds of conveyance made by Palmer to his wife, Mary M. Palmer. The case was heard in open court, and a decree made in favor of complainants, from which defendants appeal. The court filed a written opinion in the case, which sets out the facts upon which that court acted, as follows:

"For several years prior to July 22, 1893, the defendant William H. Palmer had contested in the courts the proposed will of his mother, Rebecca Palmer. In this contest and the legal controversies arising out of it, the complainant Thomas E. Barkworth had been one of his attorneys. The complainant Charles A. Blair had also acted for him as attorney in some of the litigation arising out of the settlement of his mother's estate. During the latter part of this time, and afterwards, the complainants were in partnership, as Barkworth & Blair. July 22, 1893, William H. Palmer and his sister, Annis Campbell (who was the proponent of the contested will), agreed upon a settlement of all questions growing out of the will and of their mother's estate. One of the considerations of this settlement was that Mrs. Campbell give her brother, William H. Palmer, her note for $4,000, secured by real-estate mortgage.

"August 7, 1893, William H. Palmer owned real estate in the county of Jackson of the value of at least $17,000, and also had the note of $4,000 against his sister, Mrs. Campbell. At that time his indebtedness, actual or claimed, was as follows: To Barkworth & Blair, $736; to Williamson, a lumber dealer, a small amount not precisely shown by the evidence; to William R. Brown, a small amount not precisely shown by the evidence; to Thomas I. Daniel, $80.35; to Amon Stephens, $7,000; to Gale Raymond, $800. All these debts and claims were based upon contract. William H. Palmer admitted as correct the in-

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debtedness to Barkworth & Blair, Williamson, and Brown, but disputed the claims of Daniel, Stephens, and Raymond. July 26, 1893, Stephens brought suit for his claim in the circuit court for the county of Jackson, claiming $12,000 damages, and on the same day sued out a writ of garnishment. In his affidavit for garnishment, he swore the defendant William H. Palmer owed him $7,000. July 29, 1893, Raymond began suit against Palmer, claiming $2,000 damages, and in the affidavit for garnishment sued out on that day swore that the defendant owed him $800. The summons in the Stephens case was served on Palmer July 26, 1893, and in the Raymond case on July 31, 1893.

"This was in brief the situation on August 7, 1893, when the defendant William H. Palmer made the conveyances of his real estate which are assailed by the bill in this case as fraudulent. It is plainly apparent that if we assume that the note of $4,000 against Mrs. Campbell was an asset available to creditors at its face (of which there are grave practical doubts), and the claims of Daniel, Stephens, and Raymond should be established at the amounts claimed, or any sum approaching it, creditors could collect their debts only by recourse to the real estate. If his real estate should be placed beyond the reach of creditors, and the aggregate of their claims should finally be fixed at a sum in excess of what might be realized out of the $4,000 note, the creditors would be powerless to collect such excess. The conveyances in question were made August 7, 1893. By them the defendant William H. Palmer deeded all his real estate, of the value of at least $17,000, to Harriet L. Johnson (a mere intermediary); the defendant Mary M. Palmer at the same time deeding all of her real estate, worth about $2,500, to the said Johnson; and said Johnson, by previous understanding of all the parties, deeded all the lands conveyed to her by both deeds to the defendants, William H. Palmer and Mary M. Palmer, jointly, as husband and wife. Neither of these conveyances was recorded until July 10, 1894.

"In August, 1893, William H. Palmer paid Barkworth & Blair's debt of $736. He has also since that time paid the debts of Williamson and William R. Brown. In the following fall he settled the claims of Stephens and Raymond, paying each $100. Daniel's debt has not been paid. He sued Palmer a year or more later in justice's court, and recovered a judgment for the face of his claim, filed a transcript of his judgment in the circuit court, and

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has levied execution upon the lands in question. The debt which is the basis of complainants' judgment and execution in this case arose between August 29, 1893, and May 23, 1894, which are the dates of the first and last items of their account. It will be observed that this was after the date of the deeds attacked as fraudulent, but before they were recorded. There is no doubt that both complainants gave credit to Palmer in the faith and belief that he still owned all the lands in question, and without any knowledge or notice of the conveyances assailed.

"The question is: Are the deeds of August 7, 1893, from William H. Palmer to Harriet L. Johnson, and from Harriet L. Johnson to the defendants, as husband and wife (so far as covers the lands deeded to her by William H. Palmer), fraudulent and void as to the complainants? The defendants insist that they are not, for the following reasons:

"(1) Defendants contend that the complainants stand in the position of subsequent, and not as existing, creditors, and, therefore, that these conveyances cannot be held fraudulent as to them without proof of actual intent to defraud. It is true that complainants' debt arose after the conveyances were executed, but it arose before they were recorded, and before complainants had any knowledge or notice of their existence; and the credit was extended by the complainants in good faith, relying upon the supposed fact that the defendant Palmer was still the owner of the real estate conveyed. Under such circumstances, the rule is that if the conveyance in fact operated to defeat their claim, and that was its natural result, as was the case here, it is, in law, fraudulent, without proof of any actual intent to defraud. It is therefore unnecessary to determine whether Palmer, when he executed the conveyances in question, actually intended to defraud his creditors, either existing or subsequent.

"(2) The defendants claim that these conveyances cannot be attacked as fraudulent, because they were made for a valuable consideration, the defendant Mary M. Palmer having in good faith, in consideration of William H. Palmer having deeded his lands, conveyed her own, of the value of $2,500, in the same manner. I am satisfied that this contention, as applied to the facts in this case, is incorrect, and that the fact of Mrs. Palmer having, as a part of the arrangement, placed the title of her own real estate in the same situation, affords no objection to the complainants' relief.

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"(3) It is also urged that the conveyances in question were not fraudulent, because defendant William H. Palmer retained in his hands sufficient property to pay in full all existing and contemplated creditors. As above stated, it cannot be said that Palmer retained in his hands sufficient property to pay in full all his debts. Whether the $4,000 note which he kept would have been sufficient depended upon the amount which the debts might afterwards be determined to be. The amount claimed against him was much more than $4,000. It is true that, as the amounts were afterwards fixed by settlement and judgment, their aggregate was less than $4,000. But this, I think, is not the proper test. To bring his case within this rule, Palmer must have kept in his hands for creditors enough of his assets to pay their debts at the full amount of the claims. He could not lawfully reduce his property by voluntary conveyance to an amount fixed by himself, but less than the face of their claims, and so put himself in a situation to say: 'If your debts are established at an amount less than the value of the property I have saved for you, you can collect; but, if they are fixed at a sum greater than that, you cannot collect the excess.' Neither was it safe to assume that the $4,000 note against his sister, which he retained, would be as readily available to creditors as the real estate which he conveyed. The facility with which he might manipulate such an asset to hinder, delay, or defraud creditors whose claims he thought unjust is much greater than that with which he could have prevented their claims from being collected from the real estate which he could by these conveyances put beyond their reach. Indeed, it is not surprising that although he retained the $4,000 note in his hands, and the aggregate of his debts was finally fixed at much less than $4,000, Mr. Daniel, whose claim he disputed, has been unable to collect his debt by execution without recourse to the real estate conveyed. By these conveyances, if they are valid, Palmer has actually put himself in a position where an existing creditor, whose debt he was unwilling to pay, could not collect it by law. It must therefore be held that these conveyances are not safe from attack as fraudulent for the reason that, when they were executed, Dr. Palmer retained in his hands sufficient property to pay all his debts.

"(4) It is urged by defendants that the delay in recording the conveyances from August 7, 1893, when they were executed, until July 10, 1894, when they were recorded, was not a fraudulent act, and occurred because the taxes

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had not been paid, and in fact an attempt was made to record them promptly. Assuming this to be true, the legal situation is not changed. They were in fact not recorded until July 10, 1894. Complainants had no knowledge of their existence, and in good faith gave the defendant Palmer credit for the services which are the basis of their judgment in this case, in reliance upon the supposed fact that he still owned his real estate, and had not put it beyond the reach of creditors.

"(5) Defendants' counsel claim (on brief) that neither Daniel, Stephens, nor Raymond were, on August 7, 1893, creditors of William H. Palmer, so as to be entitled to the benefit of our statute as to fraudulent conveyances of real estate, for the reason that their claims were disputed claims for damages. This is a misconception. The principle invoked is not applicable to a case like this, where all the debts and claims in question were based upon contract, and the only question as to any of them was whether they existed at all, and, if so, their amount.

"The result reached is that complainants are entitled to the relief prayed for in their bill, with costs; and decree to that effect, with appropriate formal parts, may be prepared and presented for settlement."

We think the court below was in error in its conclusion. That court was unable to find from the evidence that there was any actual intent to defraud the complainants, who were subsequent creditors; or, at least, the court did not find any such actual intent, but placed its finding in favor of complainants upon the ground that the credit was extended by complainants in good faith, relying upon the supposed fact that defendant William H. Palmer was still the owner of the real estate conveyed; and that court said: "It is therefore unnecessary to determine whether Palmer, when he executed the conveyances in question, actually intended to defraud his creditors, either existing or subsequent." This is not the rule in this State. In *Cole* v. *Brown*, 114 Mich. 396, 400, the rule is laid down, after a careful consideration of the cases in this and other States, that—

"While no fraudulent intent is necessary to set aside voluntary conveyances as to existing creditors, it must be

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established in order to set them aside as to subsequent creditors. In other words, actual fraud must be shown, and, as well, the specific intent to defraud the individual subsequent creditor complaining, or subsequent creditors generally."

See, also, *Michigan Trust Co.* v. *Adams*, 109 Mich. 181; *Wooden* v. *Wooden*, 72 Mich. 353; *Campbell* v. *Remaly*, 112 Mich. 214.

We have carefully examined the evidence in the case, and are of the opinion that it cannot be said from it that the defendants intended, when they made these deeds, to defraud the complainants, or any subsequent creditor. In order for the complainants to recover in this case, they should have shown that, at the time when these deeds were made, there was an express design on the part of the defendants to subsequently obtain credit from the complainants, and defraud them. No such showing is made, and the decree cannot be upheld.

The decree must be reversed, and a decree entered in this court dismissing complainants' bill, with costs of both courts.

The other Justices concurred.

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KNEELAND *v.* HYMAN.

TAX SALES—VALIDITY—COLLATERAL ATTACK—ATTEMPTED PAYMENT—REMEDIES—QUIETING TITLE.

The owner of land which has been sold for taxes cannot attack the decree of sale in a collateral proceeding on the ground that he was prevented from paying the tax by the conduct of the collecting officer, but, as held in *Kneeland* v. *Wood*, 117 Mich. 174, he must in such case resort to one of the remedies prescribed by sections 70 and 98 of the tax law (Act No. 206, Pub. Acts 1893). Where, however, instead of pursuing such course, a landowner sought to set up an attempted payment

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as a defense in a suit to quiet title brought by the holder of the tax deed, entry of decree was deferred, and defendant given a reasonable time within which to avail himself of the statute.

Appeal from Grand Traverse; Corbett, J. Submitted June 9, 1898. Decided July 18, 1898.

Bill by Fred A. Kneeland and John H. Cole against Herman Hyman to quiet title. From a decree dismissing the bill, complainants appeal. Reversed.

Complainants are the owners of a tax title to the land described in the bill of complaint, under a decree duly entered for the delinquent taxes of 1893 and the sale thereunder, having obtained the tax deed March 10, 1897. Defendant was the original owner. The land is wild and unoccupied. The bill sets up the deed under which the defendant derived his title, alleges that it is a cloud upon complainants' title, and prays for a decree that the title of complainants be declared paramount to that of the defendant. The answer alleges payment of the tax in due time. The court found that the taxes were not paid, but that defendant, in March, 1895, applied to the county treasurer to pay all the delinquent taxes upon the land; that the treasurer informed him that there were no taxes due for the year 1893; that the taxes were unpaid for 1894; and that defendant paid them. The payment of the 1894 tax is conceded. The court, upon the hearing, permitted defendant to amend his answer by setting up the latter defense.

Tweddle & Cross, for complainants.

Pratt & Davis, for defendant.

GRANT, C. J. (*after stating the facts*). We pointed out in *Kneeland* v. *Wood*, 117 Mich. 174, the two remedies provided by the statute in case of payment, or where the owner has been misled by the statement of the col-

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lector. That was an action of ejectment, and we held that a collateral attack upon a decree rendered in a tax suit could not be made, but that the owner must resort to one of these two remedies. If he could not make a collateral attack at law, for the same reason he cannot make it in equity. Defendant should have availed himself of one of the above remedies.

Instead of resorting to the action of ejectment, complainants have chosen to go into a court of equity. It is the province of that court to protect the rights of all parties, and do justice between them, when it can be done. It is not only inequitable, but unjust, that a person should lose his land when he has made an honest effort to pay the tax, and has been misled by the statement of the officer, on which he had the right to rely. The law does not contemplate such a result. The case of *Kneeland* v. *Wood* had not been decided when this suit was heard. Undoubtedly counsel advised that the defense could be made in this suit. We think it equitable and just that the defendant should be given an opportunity to avail himself of either of the above remedies, should he see fit to do so.

The decree will therefore be reversed, and the case remanded, and 90 days given to the defendant within which to avail himself of the statute. The complainants will recover the costs of both courts.

The other Justices concurred.

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PEOPLE v. HOTCHKISS.

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1. ORDINANCES—HAWKERS AND PEDDLERS—LICENSE FEE—REASONABLENESS.
   A city ordinance requiring hawkers and peddlers to pay an annual license fee of $5 for peddling on foot or from a stand, of $25 for peddling from a hand-cart or from a conveyance drawn by one horse or other animal, and of $50 where more than one animal is used, the licenses to be issued for one year from June 1st, or such portion of the year as intervenes between the issuance and June 1st ensuing, is not unreasonable.

2. SAME—DISCRIMINATION—RESTRAINT OF TRADE.
   Such an ordinance is not void as discriminatory and in restraint of trade.

3. SAME—UNIFORMITY.
   Such ordinance is uniform, in that it provides for a license by the year or part of the year.

Error to Wayne; Hosmer, J. Submitted June 15, 1898. Decided July 18, 1898.

Charles Hotchkiss was convicted, in the recorder's court of Detroit, of peddling without a license, contrary to the provisions of an ordinance. Upon *certiorari* to the circuit court, the conviction was set aside, and the people bring error. Reversed.

Charles Flowers, for appellant.

E. H. Hinckley, *F. Hinckley*, and *E. S. Grece* (*J. J. Speed*, of counsel), for appellee.

LONG, J. The charter of the city of Detroit provides that "the said council may also license and regulate auctioneers, hawkers, peddlers, newsboys," etc. Charter & Laws for City of Detroit (Ed. 1893), § 139. The ordinances of the city of Detroit provide (Rev. Ord. 1895), by section 1, chap. 105, that "no person shall follow the busi-

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ness or occupation of a hawker and peddler within the limits of the city of Detroit without a license from the mayor." By section 2 the mayor is given power to issue licenses. All licenses are to be for one year from June 1st, or such portion of the year as may intervene between the date of the granting of the license and the 1st day of June next ensuing. Section 3, as amended in 1897, provides:

"Any person soliciting a license shall pay therefor as follows: For hawking or peddling while traveling on foot, the sum of five dollars; for peddling from hand-carts, the sum of twenty-five dollars, and stands in the public streets, the sum of five dollars; for peddling from any conveyance with one horse or other animal, the sum of twenty-five dollars; for peddling from any conveyance drawn by two or more horses or other animals, the sum of fifty dollars."

Respondent was convicted in the recorder's court of the city of Detroit for peddling produce without a license, and the case was removed to the Wayne circuit by *certiorari*, where the conviction was set aside. The case comes to this court by writ of error.

It is contended by counsel for respondent:

1. That the ordinance is unreasonable and excessive.
2. That it is in restraint of trade, and discriminates, favoring some and injuring others in the same business.
3. That it changes the amount during the term for which the license is granted, and is not uniform.

The first point is governed by *People* v. *Baker*, 115 Mich. 199, and cases there cited. In that case an ordinance of the city of Ionia provided for a license to hawkers and peddlers of five dollars per week, and it was held not unreasonable.

The second point falls directly within the ruling of this court in *People* v. *Sawyer*, 106 Mich. 428. That case was brought under the same ordinance of the city of Detroit as the present. The question was raised there that the ordinance was in restraint of trade, and the question settled against the contention.

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The other questions need not be discussed. The ordinance is uniform, in that it provides for a license by the year or part of the year.

The order of the circuit court setting aside the conviction must be reversed, and the order of the recorder's court affirmed.

The other Justices concurred.

OTIS v. SPRAGUE.

1. DEEDS—FAILURE TO RECORD—EXECUTION LEVY.
   An unrecorded deed is good as against an execution levy, in the absence of fraud.

2. SAME—QUALIFIED CONVEYANCE—EVIDENCE.
   The facts that a deed from husband to wife was executed during the former's illness, that it was withheld from record until shortly before the maturity of an obligation incurred by the husband after the execution of the deed, and that he in the meantime effected insurance upon the premises in his own name, and retained their management, are not conclusive that it was a qualified conveyance, to take effect only in case the wife survived him, where a prior promise to convey to the wife absolutely in consideration of her caring for his mother, and the rendition of the service contemplated, are clearly shown.

Appeal from Ionia; Davis, J. Submitted June 14, 1898. Decided July 18, 1898.

Bill in aid of execution by Amos E. Otis against Alexander Sprague and Sarah M. Sprague. From a decree for complainant, defendants appeal. Reversed.

R. A. Hawley, for complainant.

McGarry & Nichols (*Allen B. Morse*, of counsel), for defendants.

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HOOKER, J. The defendants appeal from an adverse decree of the circuit court, upon a bill filed in aid of execution. The judgment upon which the execution issued was upon a promissory note given by Henry Sprague, for money borrowed from the plaintiff, the defendant Alexander Sprague being an accommodation maker. The evidence shows that the defendants are husband and wife, and that in the year 1879, while they were living upon the premises in controversy, which then belonged to said Alexander Sprague, his mother was a paralytic, living at the home of Henry Sprague, where she remained four or five weeks after her attack of paralysis. At that time the wife of Henry refused to care for her longer, and at her husband's request, and upon his promise to deed to her the place by way of compensation, Sarah Sprague, the defendant, consented to permit the mother to be brought to the home of the defendants, and promised to care for her as long as she should live, which she faithfully did. In 1881, Alexander Sprague, the husband, being in an enfeebled condition, and sick, and, according to the testimony of Mrs. Sprague, worried over the condition in which his wife and mother would be left if he should die, expressed regret that he had not made the deed as promised; and, as soon as he recovered sufficiently, he executed a deed of the premises, and gave it to his wife, who had it in her possession at all times thereafter. At that time he was not in debt. The note was made in November, 1894, and fell due November 30, 1895. The deed was recorded October 11, 1895.

The complainant's counsel does not contend that the deed was executed with a fraudulent intent, but asserts that the evidence shows that it was in the nature of a testamentary disposition of the property, made at a time when Sprague's mother was, and might continue for an indefinite period, dependent upon his wife, and when it is said the parties believed his brother, Henry, would be his sole heir, and that it was given and received with the agreement on the part of the wife that it was to be kept off record, and not

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to take effect if the husband survived the wife. As evidence of this, our attention is called to the failure to record this deed, while in other cases, where land was afterwards purchased by the defendants, the deeds were immediately recorded; to the illness of Sprague, and his fears; to the borrowing of money upon Sprague's note, secured by a mortgage on the place, to pay an outstanding mortgage; the payment of this last mortgage from the pension received by Sprague; the subsequent insurance of the buildings on the farm in the name of Sprague; the management of the farm and business by Sprague, and in his name; and the erection of buildings thereon, and alleged haste to record the deed, shortly before the note matured. On the other hand, the agreement to deed to the wife, and the subsequent performance of the promise, the immediate delivery of the deed, and the wife's subsequent and absolute control of it, are shown by their testimony; and a number of relatives testified to their understanding that this deed had been made. The testimony of the wife is such as to carry conviction to our minds that it was the understanding of the parties that the deed should convey to her an unqualified title, and the conduct and management of the farm afterwards was not so out of the usual order in such cases as to militate strongly against the defendants' claim.

If it be determined that the deed was delivered without condition or restriction, it conveyed an absolute title, which could not be affected by the fact that the husband some years later signed and did not pay the note in question. If the land was hers, it could not be made subject to the execution because she did not pay a valuable consideration for it (if she did not); nor did her failure to record her deed in any way increase her liability, as an unrecorded deed is good as against an execution levy, in the absence of fraud. It is unfortunate that the plaintiff should lose his earnings, but, being convinced that the wife has an honest title to the land, we cannot justly require her to pay the husband's debt. *Barkworth* v. *Palmer*, *ante*, 50, and cases cited.

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The decree of the circuit court is reversed, and a decree will be entered in this court dismissing the complainant's bill, with costs of both courts.

The other Justices concurred.

VINCENT *v.* SHERWOOD.

1. REPLEVIN—MORTGAGES—RES JUDICATA.

   In replevin for mortgaged chattels, the following facts appeared: That one H., to whom the mortgage was given, which purported to be security for H.'s indorsement of defendant's note, had some time previously petitioned the court asking that an injunction theretofore obtained by plaintiff, who held a mortgage on defendant's real estate and was the payee in the aforesaid note, restraining defendant from cutting timber on the mortgaged premises, be modified to the extent of allowing sufficient to be cut to pay the said note; that the court refused to modify the injunction, but ordered H. to assign the chattel mortgage to plaintiff, whom he subrogated to all the rights of H. therein, and directed plaintiff to sell the property, and release H. to the extent of the amount realized; that defendant thereupon filed a petition to have the order vacated on the grounds, among others, that he (defendant) was interested in the proceedings, and had had no opportunity to be heard, that plaintiff had agreed that defendant might cut and sell the timber, and that the mortgage to H. was to indemnify him against loss should defendant fail to apply on the note the proceeds of the sales; that the defendant's petition was denied by the circuit judge; and that no appeal was taken. *Held*, that the questions involved in the proceedings in equity were *res judicata*.

2. SAME—DAMAGES.

   It appearing that the property taken on the writ had been sold for less than the amount of the lien which plaintiff held in right of H., a verdict for six cents damages was properly directed in his favor.

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Error to Ionia; Davis, J. Submitted June 15, 1898. Decided July 18, 1898.

Replevin by William Vincent against Josiah W. Sherwood and Eliza S. Sherwood. From a judgment for plaintiff on verdict directed by the court, defendants bring error. Affirmed.

John Nichol, for appellants.

F. E. Withey, for appellee.

LONG, J. Action of replevin, in which the court below directed verdict in favor of plaintiff for six cents damages. Defendants bring error.

It appears that in December, 1893, the defendants were the owners of 159½ acres of land in Ionia county. They employed C. E. Temple, a real-estate agent, to borrow $7,000 upon said real estate. Temple applied to the plaintiff for money, and he furnished it, a part being paid, and the balance put into the bank in escrow, to be delivered when required. This loan was being made for the purpose of taking up two mortgages existing on the property,—one for $5,400, and one for $2,100,—both of which had been foreclosed, and the period of redemption nearly expired. The $7,000 being insufficient to take care of both these mortgages, Temple, as agent for defendants, applied to plaintiff for a further loan of $500, either as an addition to the first mortgage or with a second mortgage on the same property as security. Plaintiff refused both these propositions, upon which Temple made application to Royal A. Hawley, of Ionia, to assist in the matter. Hawley signed two promissory notes, one for $225, and one for $275, with defendant Sherwood, both notes being made payable to the plaintiff. To secure Hawley for these indorsements, the defendants gave him a chattel mortgage of $500 on a quantity of personal property; and, as additional security, they transferred their equity of

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redemption in 59½ acres of the lands above mentioned. The moneys obtained on these two notes to plaintiff were used in paying up the former mortgages, paying costs, etc.

A short time after giving these notes, mortgage, and deed, Sherwood commenced cutting timber on the lands. The plaintiff thereupon, as mortgagee, obtained an injunction from the Ionia circuit court, in chancery, restraining Sherwood from cutting timber. Hawley thereafter filed a petition asking to have said injunction modified to the extent of allowing sufficient timber to be cut to pay the $500 notes. Plaintiff thereupon filed a petition praying that Hawley be ordered to exhaust his chattel-mortgage security, or that he (plaintiff) be subrogated to all the rights of Hawley in the mortgage. Evidence was taken on the petitions; and the court refused to modify the injunction, but ordered Hawley to assign the chattel mortgage to plaintiff, and subrogated plaintiff to all the rights of Hawley therein, and directed that upon such assignment plaintiff be empowered and authorized to sell sufficient of the property to satisfy the expenses of sale and the amount due on the notes, and release Hawley from liability in so far as the amount realized should pay the notes. After the assignment of the mortgage to plaintiff, he, acting under the order of the court and in accordance therewith, demanded the personal property covered by the mortgage from the defendants; and, on their refusal to surrender it, he brought this action of replevin, took possession of the property, and sold it.

Defendants petitioned the court to set aside the order directing the assignment of the mortgage to plaintiff. This was denied by the court. The assignment of the mortgage from Hawley to plaintiff recites: "This assignment is made in order to comply with an order of the circuit court for the county of Ionia, in chancery, made the 13th day of September, 1894." Upon the refusal of the court to set aside the order directing this assignment, an application was made to this court for a *mandamus* to

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compel the court below to set the order aside. On the hearing in this court, the writ of *mandamus* was denied, on the ground that appeal was the proper remedy. *Sherwood* v. *Ionia Circuit Judge*, 105 Mich. 540.

Upon the trial of the replevin case, the defendants sought to show:

1. That they had no notice or knowledge of the hearing on the petitions of Hawley and plaintiff, and no opportunity to be heard.
2. That the chattel mortgage on which the suit was brought was not given on the conditions and terms of the notes offered in evidence, but was in fact given for the purpose of guaranteeing the honest use of the money received from the timber; and the circumstances under which the mortgage was given, and the real consideration therefor.
3. That a large portion of the personal property covered by the mortgage in question was the sole property of Mrs. Sherwood, and the debt was not her debt.
4. That the plaintiff had told Mr. Sherwood that Temple was his agent, and that any arrangement he made with Temple would be all right and satisfactory to him.
5. That there was an agreement with plaintiff that defendants should have the right to cut timber.

The court held that these defenses could not be made, for the reason that all these questions had been settled in the former proceedings, and that case was *res adjudicata*.

In this the court was not in error. The court of chancery had jurisdiction to pass upon these questions. *Bigelow* v. *Booth*, 39 Mich. 622; *Crittenden* v. *Schermerhorn*, Id. 661 (33 Am. Rep. 440); *Reeg* v. *Burnham*, 55 Mich. 39.

In *Huyck* v. *Graham*, 82 Mich. 353, it appeared that a sale had been made in foreclosure proceedings, and that the defendant, upon a bill filed by him to set aside the sale for defects in the notice, had been given the right to redeem on paying the amount actually due, which he failed to do, and summary proceedings were brought against him to recover possession of the premises. It was said:

"The decree did not provide for a resale upon failure to

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redeem, and in this respect was not in accordance with the established practice; but the defendant seems to have been satisfied with it. Whether it was such a one as he asked for does not appear. It is fair to presume that it was, for it nowhere appears that he objected to it, and he did not appeal. The decree is therefore binding upon him. Were he dissatisfied with it, he should have appealed, and had his rights determined and the error corrected in that suit. He cannot now be heard to attack it collaterally. * * * The court in the chancery proceedings had jurisdiction of the parties and the subject-matter, and, though the decree be erroneous, it is binding upon both parties until set aside."

In the present case the parties sought to set the order aside in a *mandamus* proceeding, and failed because appeal was the proper remedy. They were notified of that fact by the order of this court, and yet took no appeal. In this collateral proceeding they now seek to have the order made set aside. If an adjudication is once had, and the court had jurisdiction, and any question respecting it arises afterwards in a collateral suit, the adjudication will be held conclusive. *Jacobson* v. *Miller*, 41 Mich. 94. The exact points now sought to be raised were involved in the former order of the court; and, on the facts, the court found that the plaintiff was entitled to have the mortgage assigned to him for the purpose of foreclosure; that he should foreclose it, and protect Hawley on the notes. This was done.

But one other question is raised which needs consideration. It is claimed that the court was in error in directing the verdict for plaintiff for six cents damages. There would be some force in this claim if the property had sold for an amount larger than the plaintiff's claim, as he had a lien on it only for the amount of his mortgage of $500. But counsel for defendants in his brief admits that it was sold for only $119, and bid in by plaintiff.

The judgment must be affirmed.

The other Justices concurred.

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SPRINGER v. CITY OF DETROIT.

1. MUNICIPAL CORPORATIONS—CLAIM FOR PERSONAL INJURIES—PRESENTATION—LIMITATION OF ACTIONS.

A city cannot set up as a defense to an action for personal injuries that the plaintiff has not brought himself within an amendment of its charter requiring "existing causes of action" to be prosecuted within a specified time after the amendment takes effect, where, by other provisions of the charter, it is made a sufficient defense to any such action that it was brought before the common council had a reasonable time to investigate and pass upon the claim, and the delay in the particular case was occasioned by the investigations on the part of the council.

2. SAME—ESTOPPEL.

In such case the council will be assumed to have placed its own interpretation upon what constituted a reasonable time in view of the circumstances, and the city is estopped to contend that, because of its action in so prolonging its investigations, suit might have been maintained by the plaintiff upon his claim before the council had finally passed upon it.

Error to Wayne; Carpenter, J. Submitted June 15, 1898. Decided July 18, 1898.

Case by Matilda L. Springer against the city of Detroit for personal injuries. From a judgment for plaintiff, defendant brings error. Affirmed.

Charles Flowers and *C. D. Joslyn*, for appellant.

Edward S. Grece and *C. H. Freeman*, for appellee.

MOORE, J. The plaintiff recovered a judgment for damages because of injuries received upon a defective sidewalk. The defendant appeals the case here, and contends the statute of limitations had run against the claim. Some time ago plaintiff sued the city, and the case was heard in this court. It is the case of *Springer* v. *City of*

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Detroit, 102 Mich. 300. At that time no verified claim had been presented against the city before the suit was brought. There was a charter provision requiring such claim to be presented, and it was provided:

"It shall be a sufficient bar and answer to any action or proceeding in any court for the collection of any demand or claim against said city that it has never been presented to the common council for audit or allowance, or, if on contract, that it was presented without said affidavit, and rejected for that reason, or that the action or proceeding was brought before the common council had a reasonable time to investigate and pass upon it." Charter of Detroit, chap. 5, § 17.

It was held the presentation of the claim to the council was a condition precedent to bringing a suit to recover. The decision was rendered in October, 1894.

The record shows the plaintiff presented her claim for the injury alleged in the declaration in this cause, to the common council of the defendant, for audit and allowance, in November, 1894, and from time to time testimony was duly presented as to such claim; and such claim was considered by the common council committee on claims and accounts from time to time, a final hearing being had on March 3, 1896, on which day the testimony was presented to such committee in full, and the matter was then submitted for their determination. On May 12, 1896, the committee reported to the common council a disallowance of the claim, which report was accepted and adopted. This suit was begun on the 18th day of June, 1896. The court charged the jury that the action was not barred by the statute of limitations.

The charter of the city of Detroit was amended by adding section 46, which reads as follows:

"No action shall be brought against said city, nor any of its boards, commissions, or officers, for any negligent injury, unless it be commenced within one year from the time the injury was received, nor unless notice shall be given in writing, within three months from the time of such injury, to the head of the law department, or to his

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chief assistant, of the time, place, and cause of such injury, and of the nature thereof. The provisions of this section shall not be a bar to a suit for any injury for which there is now a lawful cause of action, but for every such injury suit shall be commenced within six months from the time when this act shall take effect." Act No. 463, Local Acts 1895.

This amendment took effect September 1, 1895.

It is by virtue of this section it is urged the statute of limitations has cut off the right of action. It is said on the part of the city that, even though the claim is pending and undecided before the council, the plaintiff must bring her suit within six months after the amendment took effect, or lose her right of recovery. We have already quoted the charter provision which was construed in *Springer* v. *City of Detroit*, *supra*, where it was held no action or proceeding could be maintained until the verified statement had been presented to the council. The same provision gives the common council a reasonable time in which to investigate the claim and to pass upon it. It is evident there could be no lawful cause of action until these conditions had been complied with. Who shall say what constitutes a reasonable time? In a small town, where there would be only an occasional case of this character, and the witnesses would be accessible, much less time might be a reasonable time than in a large town, where there were many claims to be investigated, and where the witnesses were scattered, or, as in this case, four years had elapsed after the alleged injury before the investigation was entered upon. There is nothing to indicate but the investigation was pursued in good faith, and that the delays were at the request of the city itself. It does appear affirmatively that there was a full hearing of the claim before the committee after the six months had expired, and that some days thereafter the committee reported to the council a disallowance of said claim, which report was adopted by the council. The committee and the council, by their acts, have placed their interpretation

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upon what in this case, with its surroundings and circumstances, was a reasonable time. The plaintiff acted upon their interpretation, and presented her witnesses before the committee. We do not think now, when the action of the city has carried the claim beyond six months after the amendment took effect, it can be said by the city a lawful cause of action existed until the council acted upon the investigation made. The plaintiff might have urged the council were delaying beyond a reasonable time; but the council cannot be heard to say that, though they were acting, they were not acting within a reasonable time, and therefore the action cannot be maintained.

In *Westchester Fire Ins. Co.* v. *Dodge*, 44 Mich. 420, it is said a claim under a fire-insurance policy does not mature until the company has decided whether it will exercise the right to rebuild, if such a right is reserved. In this case it is also held that, where the proofs of loss were furnished within a reasonable time before the end of the period fixed in the policy for bringing suit, the right to sue cannot be cut off by the company withholding its decision upon the proofs until that period has expired, even though the time allowed for examining the proofs would have consumed it.

In the case of *Voorheis* v. *People's Mutual Benefit Society*, 91 Mich. 469, there was a provision in the policy that no suit should be sustainable in any court unless the suit was commenced within nine months after the death of the person. The suit was not brought until after the nine months had expired. The delay had been caused by negotiations looking to a settlement. In disposing of the case this language was used:

"The time limited for the commencement of the action could not commence to run until after the cause of action accrued, and the action did not accrue until after the furnishing of the proofs of loss. But beyond this time it was extended by the negotiations for settlement, and overtures made by the defendant company looking to a settlement. The company could not delay the party entitled to bring suit, by promises of payment and overtures for settlement,

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beyond the period fixed for bringing the suit, and then set up in its defense that the action was not brought within the limit of time stated in the contract."

We have already seen there was no lawful cause of action, within the meaning of the statute, until a verified claim had been presented to the council, and a reasonable time given them to investigate, and decide what the city would do. Both parties treated the investigation as though made within a reasonable time, and, as the delay was caused by the investigation, the city cannot set it up as a defense in this action.

Judgment is affirmed.

The other Justices concurred.

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PEOPLE v. SMITH.

1. GRAND JURY—CHALLENGE—TRIAL.

On a trial under an indictment by a grand jury, the accused can avail himself of no objections going to the competency of a grand juror other than those to which, under the statute (2 How. Stat. §§ 9496, 9497), he is limited when held to answer to such jury, viz., that the juror is prosecutor or complainant.

2. SAME—INDICTABLE OFFENSE.

A violation of the state liquor law (Act No. 313, Pub. Acts 1887) is an indictable offense, since the statute does not appoint a particular remedy, or provide a particular method of procedure, exclusive of indictment.

Exceptions before judgment from Berrien; Coolidge, J. Submitted June 16, 1898. Decided July 18, 1898.

Charles A. Smith was convicted of violating the liquor law. Conviction affirmed.

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O'Hara & O'Hara, for appellant.

G. M. Valentine, Prosecuting Attorney, for the people.

GRANT, C. J. Respondent was indicted by a grand jury of Berrien county for keeping his saloon open on Sunday, contrary to section 17 of the state liquor law (3 How. Stat. § 2283*e*), tried, and convicted. Two questions are presented: (1) Was the grand jury a legal body? (2) Is the violation of the liquor law of the State an indictable offense?

The statute is conclusive of the first question. The objections relate to irregularities in the drawing of the jury. The statute specifies what shall be a ground of challenge, viz., that a juror is prosecutor or complainant. It expressly prohibits a challenge on any other ground. 2 How. Stat. §§ 9496, 9497. The question is discussed by Mr. Justice MORSE in *People* v. *Lauder*, 82 Mich. 133, authorities cited, and statute quoted. An objection prohibited by the statute when the grand jury is impaneled cannot be valid when the party is put upon trial under the indictment found. There was no fraud or willful disregard of the law, or even an indication that competent jurors were not secured, or that respondent was prejudiced.

Upon the second point counsel cite no authority. The following cases sustain the right to proceed by indictment: *People* v. *Stevens*, 13 Wend. 341; *People* v. *Brown*, 16 Wend. 561; *State* v. *Meyer*, 1 Spears, 305; *Keller* v. *State*, 11 Md. 525 (69 Am. Dec. 226). The rule is thus stated by Russell: "Where the statute creates a new offense, by prohibiting and making unlawful anything which was lawful before, and appoints a particular remedy against such new offense by a particular sanction and particular method of proceeding, such method of proceeding must be pursued, and no other." 1 Russ. Crimes (Internat. Ed.), 201; 10 Enc. Pl. & Prac. 351. Act No. 313, Pub. Acts 1887, does not appoint a particular remedy or provide a particular method of procedure. It leaves open either method.

Conviction affirmed.

The other Justices concurred.

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PEOPLE v. GOULD.

1. REAL-ESTATE BROKERS—COLLECTIONS—AGENCY.
   R. purchased real estate, taking title in his wife's name. Subsequently he put the property in the hands of a real-estate broker, who sold the same on credit, and secured the purchase price by a note and mortgage, which he drafted, running to the wife of R. Thereafter the mortgagee executed a discharge, and R. forwarded it to the broker, who received payment in full from the mortgagor. *Held*, that the broker could not claim that in the collection he was the agent of R., and not of R.'s wife.

2. EMBEZZLEMENT—EVIDENCE—INSTRUCTIONS.
   An instruction permitting the conviction of a respondent for embezzling the proceeds of a mortgage collected by him, although he received the money before the date of the embezzlement charged in the information, if he held the money at that time as agent for the owner, and within six months thereafter appropriated the same to his own use, is justified by a letter from the respondent after the collection, but before the date charged, stating that the mortgagor would like to have the mortgage run for the time being, and a letter written within six months after such date, purporting to inclose interest on the mortgage.

Exceptions before judgment from Jackson; Peck, J. Submitted June 16, 1898. Decided July 18, 1898.

Ralph B. Gould was convicted of embezzlement. Conviction affirmed.

James W. Blakely, for appellant.

Fred A. Maynard, Attorney General, and *Elmer Kirkby*, Prosecuting Attorney, for the people.

LONG, J. Respondent was convicted of embezzlement. At the time the offense is claimed to have been committed, the respondent and his father, Andrew J. Gould, were

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doing a real estate and loan business in the city of Jackson, under the firm name of A. J. Gould & Son, but, previous to the payment made upon which the respondent was convicted, the father had removed to Tennessee, and the respondent continued the business under the firm name. It appears that several years ago one Alfred K. Rawson purchased certain real estate in the city of Jackson, taking the title in the name of his wife, Sylvia A. Rawson. Rawson and his wife moved to Missouri some eight or ten years ago. Mr. Rawson put the property into the hands of A. J. Gould & Son, who consummated a sale of it in June, 1890, to William H. Elliott, for $2,000, the sum of $1,200 being paid in cash, and the $800 secured by note and mortgage running to Sylvia A. Rawson. The money and note and mortgage were forwarded to Alfred K. Rawson. May 3, 1893, Sylvia A. Rawson executed a discharge of the mortgage, and Mr. Rawson forwarded it to A. J. Gould & Son. On May 20th following, the respondent delivered this discharge to Mr. Elliott, and received from him $203, the balance of the money due; all the rest of the money due on the mortgage having been paid by him to A. J. Gould & Son prior to May 3, 1893. The $800 was never paid over either to Mr. or Mrs. Rawson. On July 26, 1893, the respondent wrote Mr. Rawson that Mr. Elliott would like to have the mortgage run until September. On October 20, 1893, he again wrote Mr. Rawson, inclosing draft for $48, saying, "It being for a year's interest on the Elliott mortgage." Mr. Rawson died in March, 1897. In August of that year, Mrs. Rawson came to Jackson, and demanded the interest on the mortgage, which was paid by the respondent. She then made a demand for the principal, and, the respondent failing to pay it, she made complaint against him for embezzlement, setting up that he was her agent in the collection and misappropriation of the money. The case was submitted to the jury under a very fair charge. A verdict of guilty was returned. The case comes to this court on exceptions before sentence.

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1. Counsel for respondent claims that the proofs negative the theory that respondent was the agent of Sylvia A. Rawson, and show that he was the agent of her husband, Alfred K. Rawson.

The mortgage collected was in the name of Sylvia A. Rawson, belonged to her, and she executed the discharge thereof. This mortgage was drawn by the respondent himself, and the discharge came to him executed by Sylvia A. Rawson, and he delivered it to Elliott, and received the money thereon. It clearly appears that, while Alfred K. Rawson was doing the business for his wife, she owned the mortgage, and that in the collection of it the respondent acted for her, and was her agent.

2. It is said that the proofs do not disclose any act of respondent showing that the money was converted by him on the date charged in the information, or within six months thereafter, and that, therefore, the respondent should have been discharged.

2 How. Stat. § 9421, provides that, on prosecutions for embezzlement, "evidence may be given of any such embezzlement committed within six months next after the time stated in the indictment." In *People* v. *Donald*, 48 Mich. 491,—being a prosecution for embezzlement,—it was held that under this statute an information for embezzlement could not be sustained by evidence of acts committed before the time stated in the information. This construction was given by the supreme court of Wisconsin to a similar statute. *State* v. *Cornhauser*, 74 Wis. 42.

On the trial, after the people had rested, counsel for respondent moved the court that the respondent be discharged, for the reason that no evidence had been given showing any act of embezzlement on August 24, 1893,—the date charged in the information,—or within six months thereafter. The court thereupon permitted the prosecution to read in evidence the following letter:

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"JACKSON, MICH., October 20, 1893.
"A. K. RAWSON, Esq.,
"Jefferson City, Mo.
"*Dear Sir:* We herewith inclose draft on New York for $48, less exchange, being for a year's interest on the Elliott mortgage. Very respectfully,
"A. J. GOULD & SON."

The court overruled the motion to discharge, and charged the jury:

"By the undisputed testimony, this money, if paid to the respondent at all, was paid on May 20, 1893, before the time charged in the information. Now, I charge you that if you find from the evidence, beyond a reasonable doubt, that this money was in fact the money of Mrs. Rawson, and that respondent was her agent; that the money was paid to him as her agent, and was received by him as such; and that he held the money, as such agent of Mrs. Rawson, on August 24, 1893, or within six months thereafter, and the embezzlement was committed of it by him on August 24th, or within six months thereafter, and while the relation of agent to Mrs. Rawson continued, and the conditions I have stated existed, * * * that the case here should be regarded as complete, notwithstanding the money was so paid to and received by the respondent before August 24, 1893. * * * If you are satisfied from the evidence, and beyond a reasonable doubt, that the appropriation of the money to his own use, with the intent essential to constitute the crime of embezzlement, occurred after the 24th day of August, and within six months after that date, you should regard this essential element of the crime charged as being well proven."

The only objection which counsel makes to this charge is that there was no evidence in the case to support it, or in any way to show the embezzlement after August 24th.

We think the letter of October 20, 1893, connected with what had been written by respondent in July previous, has a tendency to show that fact. The letter of July shows that respondent may have had it in mind to appropriate the money to his own use, as he there stated that Elliott desired to have the time extended on the mortgage till in September, when, in fact, he had already received

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it. Had Mr. Rawson called for the payment of the money at that time, it is possible it might have been paid over to him by the respondent. But on October 20th he had evidently made up his mind to appropriate it, and sought to put off inquiry by sending the interest.

Counsel for respondent claims, however, that the letter of October 20th was not identified as having been written by respondent. We have carefully examined the testimony of Mr. Elliott, and think the identification of the letter is sustained by that.

The court below is advised to proceed to judgment.

The other Justices concurred.

PEOPLE v. CARREL.[1]

INTOXICATING LIQUORS—OBSTRUCTING VIEW OF BAR—HOTELS.

That a bar is in the same room as an hotel office does not take it out of 3 How. Stat. § 2283*f*4, requiring that all obstructions to the view from the street shall be removed during the times at which the law requires places kept for the sale of liquor to be closed.

Exceptions before judgment from Allegan; Padgham, J. Submitted June 16, 1898. Decided July 18, 1898.

Isaac W. Carrel and Chester Carrel were convicted of violating the liquor law, in that they obstructed the view of their bar from the street. Conviction affirmed.

Samuel D. Clay and *David Stockdale* (*Everett D. Comstock*, of counsel), for appellants.

Fred A. Maynard, Attorney General, and *Fidus E. Fish*, Prosecuting Attorney, for the people.

[1] Rehearing denied September 27, 1898.

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MOORE, J. The respondents are keepers of an hotel in Dorr, Allegan county, and are also engaged in the sale of intoxicating liquors. Their bar is upon one side of a barroom, which room is also used as the office of the hotel. This office has windows upon two sides, through which persons from the street could command a view of the bar. The respondents were convicted of having, between 9 o'clock at night and 7 o'clock in the morning, not removed the curtains, screens, partitions, and other things that obstructed the view, from the street, of the bar or place where the liquors were sold and kept for sale. After a trial they were found guilty, and bring the case here by appeal.

The only question involved in the case is whether, where a bar is kept in a barroom which is also used as an hotel office, the curtains or screens to the windows of such a room must be raised or removed so as not to obstruct the view of the bar, or place where the liquor is sold, from the street. Section 31, Act No. 313, Pub. Acts 1887 (3 How. Stat. § 2283*f*4), reads as follows:

"During the time when, by the provisions of this act, places where liquor is sold or kept for sale must be closed, all curtains, screens, partitions, and other things that obstruct the view, from the sidewalk, street, alley, or road in front of or at the side or end of said building, of the bar or place in said room where said liquors are sold or kept for sale, shall be removed. Any person who shall violate any of the provisions of this section shall, upon conviction thereof, be punished as provided in section seven of this act."

The language of the statute is plain, simple, and unambiguous. It does not make exception in favor of a barroom which is also used as an hotel office. The purpose to be accomplished by the statute is discussed in *People* v. *Kennedy*, 105 Mich. 75.

The conviction is affirmed.

The other Justices concurred.

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SIMEK *v.* LODGE NO. 86 OF THE BOHEMIAN SLAVONIAN BENEVOLENT SOCIETY OF THE UNITED STATES.

1. BENEFIT SOCIETIES—BY-LAWS—EXPULSION OF MEMBERS.
   The by-laws of a benefit society provided that fines imposed on members should be added to the dues, that members should be notified of arrearages, and that "the expulsion of a member shall take place for the following offenses: (*a*) A member who has not paid all of his dues and fines at the monthly meeting." A fine having been imposed on a member, it was added to his dues, and, not being paid after notice, he was expelled. *Held*, that the expulsion was valid.

2. SAME—FINES—RATIFICATION OF PRESIDENT'S ACT.
   The question whether a benefit society ratified the action of its president in imposing a fine upon a member becomes immaterial if an order of expulsion for nonpayment of the fine is so ratified.

3. SAME—NOTICE OF EXPULSION—WAIVER.
   A member of a benefit society waives the requirement of the by-laws that a notice of expulsion shall be sent by registered letter, where he receives an unregistered letter, and acts upon it by appealing to the grand lodge from the order of expulsion made by the subordinate lodge.

Certiorari to Wayne; Donovan, J. Submitted June 28, 1898. Decided July 18, 1898.

Mandamus by John Simek to compel Lodge No. 86 of the Bohemian Slavonian Benevolent Society of the United States to restore relator to membership in the society. From an order granting the writ, respondent brings *certiorari*. Reversed.

Henry N. Brevoort, for relator.

William B. Jackson, for respondent.

LONG, J. At a regular meeting of the respondent lodge,

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June 5, 1897, the relator was fined the sum of one dollar by the president of the lodge for not obeying the call to order then and there made by the president in the presence of the members of the lodge, which the respondent now claims was lawfully imposed in accordance with, and by virtue of, the constitution and by-laws then in force in that order. The relator having refused to pay such fine, the same was added to his dues and assessments. Having thereupon refused to pay his dues and assessments by reason of said fine having been added, he was expelled from the lodge. Relator then appealed from such order expelling him to the grand lodge, where the action of lodge No. 86 was affirmed. It is claimed by respondent that this was the tribunal of ultimate appeal.

Relator filed his petition in the Wayne circuit court for a *mandamus* to compel the respondent to reinstate him in the lodge. Respondent answered the order to show cause. The issues raised by the petition and answer came on to be heard before Judge Donovan in the Wayne circuit court. Respondent introduced in evidence the constitution and by-laws of the order, the records of the lodge relating to the imposing of the fine and expulsion of relator, the record of the appeal, and the action of the grand lodge. Testimony was also taken in the cause by relator and respondent. March 26, 1898, the court granted the *mandamus*. The case is now brought into this court by writ of *certiorari*.

Section 2, art. 7, of the constitution provides:

"The fines and reprimands by the president shall be determined by the by-laws of the subordinate lodges."

Section 4, art. 7, provides:

"The expulsion of a member shall take place for the following offenses: (*a*) A member who has not paid all of his dues and fines at the monthly meeting. * * *"

Section 4 also provides that a member—

"Shall be notified of his arrearage by the financial secretary, and if, after such notice, he fails to pay his in-

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debtedness at the following monthly meeting, he is expelled."

Section 5, art. 7, provides:

"All fines imposed upon members shall be recorded in a special book, and, if not revoked, shall be added to the dues of such members."

It appeared on the hearing of the cause in the court below that the by-laws of the lodge were printed in the Bohemian language, and a translation made, which appears in the record before us. Such by-laws provide, substantially, that any member of the lodge shall be liable to a fine of one dollar, "who, during the meetings, does not preserve order, or who does not obey the warning of the chairman." The record of the meeting shows that a fine of one dollar was imposed upon the relator for disobeying the chairman when called to order. It was shown that he did not pay his fine. It therefore appears from the record that the relator was lawfully fined one dollar, which he refused to pay. This fine was added to his dues, after having been duly recorded in the special book, as required by section 5, art. 7, of the constitution, and the fine has never been revoked. Relator was notified of the amount due the lodge for the fine and dues, as required by subsection *a*, § 4, art. 7, of the constitution. This notice was in writing, and it was shown that it was received by relator, and at the following monthly meeting he was expelled.

The court below seems to have had some doubt as to the explicitness of subsection *a*, § 4, art. 7, of the constitution, in providing under what circumstances a member should be expelled from the order. We think the fair interpretation of this section is that the member shall be expelled from the lodge and the order for the offenses enumerated in the by-laws, and the relator was found guilty of the violation of the by-law above set forth.

Counsel for relator contends that the action of the president was not ratified by the lodge. The order of expul-

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sion was, however, ratified. The record of the meeting of July 31, 1897, shows that the expulsion was ratified.

It is also contended that the notice of expulsion sent to relator was not sent as the by-laws require; that is, by registered letter. The letter was, however, received and acted upon by the relator. He appealed to the grand lodge after the notice was received by him.

We are satisfied that the president acted within the power conferred by the by-laws, and that it was the duty of the relator to pay his fine, if he desired to retain his standing in the lodge.

One other point is suggested, and that is that the relator tendered the money, including the fine, to the secretary, before the time of expulsion. The record does not show this fact. All that is claimed is that the relator went there, as he claims, to pay the money, but the president would not give him the password, and he therefore could not get into the lodge, and the president told him he was no longer a member.

The order of the circuit court granting the *mandamus* must be reversed, and the *mandamus* denied.

The other Justices concurred.

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BLITZ v. FIELDS.

MECHANICS' LIENS—CONTRACT PRICE—PRO RATA DISTRIBUTION.

Under the mechanic's lien law (Act No. 179, Pub. Acts 1891, as amended), a subcontractor, material man, or laborer is entitled to a lien only for his *pro rata* share of the contract price, where the same is less than the cost to the contractor.

Rehearing, on application of defendant, of case reported in 115 Mich. 675. Modified and affirmed July 18, 1898.

Moore & Moore, for complainant.

James H. Pound, for defendant.

LONG, J. This case is reported in 115 Mich. 675. Since the case has been published, a rehearing has been granted. Upon a further investigation of the case, it is found that one of the questions raised by counsel for defendant was overlooked. It appears that the whole contract price was $1,500, and added thereto was $23 to complete the building, or a total of $1,523. Mr. Fields had paid the contractor, for the subcontractors and material men, the whole amount of the contract price; that is, $1,523. He made these payments in full, in the belief that the Blitz bill had been paid by the contractor, to whom he had paid the money for that purpose. These payments were made before he had any notice that the Blitz bill had not been paid. If the amount of the Blitz bill of $157.81 be added to the amount already paid out by Fields, it would amount to $1,680.81; so that, under the rule laid down in *Fairbairn* v. *Moody*, 116 Mich. 61, 65, Mr. Blitz would be entitled to only 1523-1680.81, or 89 per cent., of his claim, which would amount to $139.45, instead of the amount allowed in the former opinion, of $157.81. This difference of $18.36 will be deducted from the complainant's former decree, which, so modified, will be affirmed. No costs of this court will be allowed to either party.

The other Justices concurred.

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DOUD *v.* MACKINAC CIRCUIT JUDGE.

MANDAMUS—DISSOLUTION OF INJUNCTION.

Mandamus will not be granted to compel the dissolution of a preliminary injunction, where the petition does not show that the court abused its discretion in refusing to dissolve it.

Mandamus by James Doud to compel Oscar Adams, circuit judge of Mackinac county, to dissolve a preliminary injunction. Submitted July 12, 1898. Order to show cause denied July 18, 1898.

M. V. & R. A. Montgomery, for relator.

PER CURIAM. Relator claims that he was duly elected a member of the school board of school district No. 1 of Mackinac Island at the regular election held July 12, 1897, and that his election was duly announced; that he duly qualified and acted as such member. September 20, 1897, one Emerick, a member of said board, holding over by reason of the failure of his duly-elected successor to qualify, filed a bill in chancery to restrain relator from interfering with the school-house or school property, and from interfering with the management and control of the other alleged officers. Relator answered said bill, denying all material averments, and moved to dissolve the preliminary injunction which had been granted. That motion was denied October 5, 1897. Relator now asks for the writ of *mandamus* to compel respondent to set aside the injunction.

We do not find any statement in the petition which would justify us in holding that the court abused its discretion in such matters.

Order to show cause denied.

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PENINSULAR SAVINGS BANK *v.* WARD.

1. HIGHWAY TAXES—VALIDITY.

A vote at a township meeting, ordering 1 per cent. to be spread upon the tax roll for highway purposes, cannot, where that amount was actually spread upon the roll, be treated as a vote of ¼ of 1 per cent. in money, and a vote of highway labor as to the balance, in order to avoid the effect of 1 How. Stat. §§ 1326, 1327, which restrict the money tax for highway purposes to ¼ of 1 per cent., but permit an assessment of highway labor at the rate of one-half day on $100 valuation.

2. SAME.

Nor can it be presumed in such case that a portion of the tax spread was authorized by the board of supervisors under 1 How. Stat. § 483, subd. 15, providing that the board may authorize townships to raise money, by a vote of the electors, for the building or repairing of highways.

3. SAME—STATE ROADS—REPAIRS—AUTHORITY OF BOARD OF SUPERVISORS.

The board of supervisors has no authority to raise a tax for the purpose of repairing, through its own committees or members, State and Territorial roads, thereby invading the jurisdiction of highway commissioners and overseers, whose duty it is to keep them in repair, even if the board has power to vote money for the repair of such roads under any circumstances.

4. TAX SALES—VALIDITY OF DECREE—DATE OF HEARING.

Under section 66 of the tax law of 1893 (Act No. 206, Pub. Acts 1893), authorizing substituted service of notice of hearing of the auditor general's petition for the sale of delinquent lands, and providing that if it shall be made to appear to the court, within five days after the day fixed for hearing, that any person, without fault on his part, has been prevented from filing objections to the tax, further time may be granted for that purpose, a decree of sale is void as to persons who did not appear, or otherwise waive the right to apply for further time, where it was rendered, and an adjournment taken, on the day following that fixed for the hearing.

5. SAME—COLLATERAL ATTACK—STATE BIDS.

A tax deed cannot be attacked collaterally upon the ground

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f121	96
118	87
128	75
118	87
128	311
128	618
118	87
s76NW	161
s79NW	911
130	s685
118	87
s76NW	161
e132	s268
132	488
133	s693
118	87
f136	s158
136	s160
136	s161
136	s670
118	87
137	503
118	87
141	s189
118	87
143	98
143	s241
118	87
146	s506
118	87
154	s655
154	s656
154	s657
118	87
157	s416

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that the lands were held by the State by virtue of a State bid at the time of the filing of the auditor general's petition, and were therefore improperly included therein under section 61 of the tax law, as construed in *Connecticut Mut. Life Ins. Co.* v. *Wood*, 115 Mich. 444.[1]

Error to Presque Isle; Kelley, J. Submitted June 15, 1898. Decided July 18, 1898. Rehearing granted December 28, 1898. Reargued February 15, 1899. Former opinion approved July 11, 1899.

Ejectment by the Peninsular Savings Bank against Arthur Ward and Charles H. Fults. From a judgment for defendants on verdict directed by the court, plaintiff brings error. Affirmed.

Bacon & Palmer (*Brennan, Donnelly & Van De Mark*, of counsel), for appellant.

Cahill & Wood, amici curiæ, on rehearing.

Lot Nevius and *Smurthwaite & Fowler*, for appellees.

HOOKER, J. The plaintiff is admitted to have been the owner of the government title to the premises in question. The action is ejectment, and the defendants claim under tax deeds for taxes for the several years 1883, 1884, 1885, 1886, 1888, 1889, 1890, 1891, 1892, and 1893. The court directed a verdict for the defendants. Hence, if it be

[1] This point is an interesting one in its relation to other tax decisions rendered subsequent to the original opinion in the main case. Thus, while it was urged in *Detroit Fire & Marine Ins. Co.* v. *Wood*, *ante*, 31, that the provision of section 70 of the tax law, that "no sale shall be set aside after confirmation, except in cases where the taxes were paid or the property was exempt from taxation," was an unlawful restriction upon the equitable powers of the court, and the court declined to pass upon the question, the validity of the provision was afterwards sustained in *Spaulding* v. *O'Connor*, 77 N. W. 323, *Berkey* v. *Burchard*, Id. 635, *Brooks* v. *Auditor General*, 78 N. W. 125, *Shefferly* v. *Auditor General*, 79 N. W. 693, and *Wilkin* v. *Keith*, Id. 887, and it was held that, after confirmation, a sale could be set aside only for one of the causes specified, or for a want of jurisdiction to enter the decree. It was therefore contended by counsel upon the rehearing of the case at bar,

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found that one of said tax deeds is valid, the judgment should be affirmed. It is conceded that those for the taxes of 1883, 1884, 1888, 1889, and 1890 are void.

Two points are raised upon the tax deed for the taxes of 1885, viz.:

1. That the highway tax was excessive.
2. That there was no apportionment of the State tax.

The record of the annual township meeting shows the following:

"The annual report of the township clerk was then read, and the following amounts were ordered to be spread upon the tax roll for the year 1885; that is to say: One per cent. for general township purposes, one per cent. for highway purposes, one-half per cent. for bridge loan."

The statute then in force (1 How. Stat. § 1326) provided that the commissioner of highways should report to the township board, at the annual meeting, an estimate of the amount of highway labor necessary, and the improvements necessary to be made in the highways and bridges during the year, and the amount of money tax that should be levied therefor, beyond the estimated labor. The statute restricts the labor to one-half day on $100 valuation, and the money tax to 50 cents upon such valuation. Section 1327 provides that a majority of the electors present may determine the amount of labor and money tax, within these bounds. As has been seen, the electors voted a money tax of 1 per cent. for highway purposes. It is

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as well as in other cases, that the *Wood Case*, in 115 Mich., must have proceeded upon the theory that the question involved therein was jurisdictional; that, if so, it could be raised at any time and in any proceeding; and that the original decision in the present case should not stand. This contention, however, apparently overlooked the distinction, very clearly drawn in the rehearing opinion herein, between jurisdictional defects apparent upon the face of the proceedings, and those which can be established only by evidence *aliunde;* and a fair deduction from all of the cases would seem to be that a sale will not be set aside in any case, except for one of the reasons specified in section 70, or for defects going to the jurisdiction; and that, as to the latter, if the defect be one that can be shown only by evidence *dehors* the record, the attack must be made in a direct proceeding.—REPORTER.

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urged that this was no more than it was within their power to raise, and that one-half of it should be treated as a vote of highway labor, and the remainder a money tax, in which case neither would be excessive. The record shows that the entire amount was spread, and if we might assume that no labor was done or commuted, which is improbable, we should still be confronted by the fact that the vote shows that the electors directed that amount to be spread upon the roll. We cannot conclude, therefore, that any part of it was intended as a vote of highway labor. It is also suggested that we may assume that a part of the amount spread was a tax authorized by the board of supervisors, under 1 How. Stat. § 483, subd. 15; but we think, in view of the vote of the township, that the presumption is to the contrary.

We consider it unnecessary to discuss the question upon the apportionment.

The tax of 1886 is attacked upon the ground that $1,000 was raised upon the following resolution:

"Because the board of supervisors passed the following resolution: '*Resolved*, that the sum of $1,000 be raised by tax for the current year, and that this sum be expended upon the State and Territorial roads within the county, and that each member of this board be made the agent of this board to superintend the expending of the sum of $100 thereof, and to designate the place or places where the same shall be expended, but to place at least 50 per cent. of said amount within the townships represented by them, respectively.'"

It is contended that the resolution should have designated the road or roads upon which it was to be expended, and that it was not competent to apportion it out to the several supervisors to expend according to their judgment.

We infer from this resolution that it was the aim of the board to repair the Territorial and State roads. Sections 9 and 11 of article 10 of the Constitution provide:

"The board of supervisors of any county may borrow or raise by tax one thousand dollars for constructing or repairing public buildings, highways, or bridges; but no

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greater sum shall be borrowed or raised by tax for such purpose in any one year, unless authorized by a majority of the electors of such county voting thereon."

"The board of supervisors of each organized county may provide for laying out highways, constructing bridges, and organizing townships, under such restrictions and limitations as shall be prescribed by law."

In *Attorney General* v. *Board of Sup'rs of Bay Co.*, 34 Mich. 46, it was held that the power of the board, under these provisions, was limited by the statute. 1 How. Stat. chap. 17. Subdivision 7, § 11, of said chapter (compiler's section 483), authorizes the board to raise money by tax for any of the purposes named in the act, but restricts it to $1,000 per year for the purpose of repairing highways, etc. The restriction does not purport to confer any power, and the power to repair roads must be sought elsewhere. Section 497 authorizes the board to cause to be laid out, established, altered, discontinued, or opened all State and Territorial roads. The three following sections pertain to this power, and it has been held that these four sections limit the powers given by section 11 of article 10 of the Constitution to Territorial and State roads. See *People* v. *Highway Com'rs of Nankin*, 15 Mich. 347; *Attorney General* v. *Board of Sup'rs of Bay Co.*, 34 Mich. 46. So far we find no authority for the expenditure of money by way of repairs upon State or Territorial roads, and our attention is not called to any statute conferring it. The duty of repairing these roads is upon the township. 1 How. Stat. § 1321. In *Attorney General* v. *Board of Sup'rs of Bay Co.*, *supra*, it is said:

"Taxes and loans, when authorized to be raised by any public body, must be raised under the implied condition that they are to be applied to the public uses under the control or care of that body. They cannot be raised for the purposes or uses of others, unless such a power is plainly given, and such a power cannot be given for all purposes. The highways and roads are put under their control by the Constitution, not absolutely, but under legal restrictions. Those legal restrictions have confined them to State and Territorial roads. Other roads

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are put under other officers, to avoid a clashing of jurisdictions. The county board can have no occasion to raise money for other than its own roads, and must exercise its own judgment in expending it."

The law plainly imposes upon townships the burden of repairing these roads, and it does not seem to have ever required or permitted counties to keep them up. They are State roads, not county roads; and the State has not imposed the duty of maintaining them upon counties, though it did allow the counties to construct them. Whether this may now be done at county expense, in view of section 1321, we need not consider. But the power to repair appears to be conceded by counsel, and as we have not the aid of a discussion of this question, and may have overlooked some statute or reason leading to a different conclusion upon this point, we do not decide that the board may not raise money for the repair of such roads. At all events, we are satisfied that the board of supervisors had no legal authority to raise this tax for the purpose of repairing, through its own committees or members, State and Territorial roads, thereby invading the jurisdiction of highway commissioners and overseers, whose duty it is to keep them in repair. We must therefore hold that the deed for the tax of 1886 was void.

The deed for the tax of 1891 is said to be void for several reasons. A discussion of one will suffice. The day set for the hearing of the auditor general's petition was November 14, 1893,—the second day of term. The decree was made and court adjourned on the 15th. This proceeding is governed by the act of 1893. Section 66 of the law provides that—

"If, within the first five days after the day fixed in such notice for the hearing of such petition, it shall be made to appear to the court that any person has been prevented from filing objections to any tax, without fault on his part, such further time may be granted for that purpose as may seem proper, not exceeding five days." Act No. 206, Pub. Acts 1893.

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It is urged that this is but an irregularity; that jurisdiction of the person was acquired by the publication, and that, though the decree might be vacated in a direct proceeding, it cannot be attacked collaterally; and that it is like a judgment entered upon a premature default.

Our decisions make a distinction between cases where personal service is obtained, and those of substituted service. In the latter the judgment is void if the statutory requirements are not followed. Thus, in attachment cases it has been held that the premature filing of a declaration, or the want of a valid default, rendered the judgment a nullity. See *Steere* v. *Vanderberg*, 67 Mich. 536; *Nugent* v. *Nugent*, 70 Mich. 56. We are constrained to say that this avoids the decree as to those who have not appeared, or otherwise waived the right to apply for further time.

The deeds for the taxes of 1892 and 1893 are said to be void for the reason that the lands were not subject to sale, inasmuch as it appears upon this record that, at the time the petition was filed, they were held by the State by virtue of a State bid. If that was true, they should not have been included in the petition; but this question cannot be raised collaterally. The decree has determined the contrary. *Cole* v. *Shelp*, 98 Mich. 56; *Kneeland* v. *Wood*, 117 Mich. 174; *Muirhead* v. *Sands*, 111 Mich. 487. The only way to reach such questions is in a direct proceeding, or possibly in equity, under proper circumstances.

It follows that the judgment of the circuit court was correct, and it is affirmed.

MONTGOMERY, MOORE, and LONG, JJ., concurred. GRANT, C. J., did not sit.

ON REHEARING.

HOOKER, J. The opinion filed in this cause upon the original hearing will be found at page 88, *ante*, and the case is there made to turn upon tax deeds for the taxes of

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1892 and 1893. It was contended that these were void, for the reason that, at the times the respective petitions were filed to foreclose the lien of the State for the taxes for those years, the land was held by the State, having been bid in for the tax of 1891. The subject was not discussed by counsel for the plaintiff in their brief, further than to claim that the proceedings were void, under the case of *Connecticut Mut. Life Ins. Co.* v. *Wood*, 115 Mich. 444. The opinion attempted to distinguish the cases; that being a proceeding to set aside the sale and cancel the deed, while this is ejectment. It was said that the deed could not be thus attacked collaterally. The case was reheard upon this point, it not having been discussed before.

Whether or not the lands in controversy were, at the time the petition of the auditor general was filed, lands previously bid off in the name of the State, and thus held, was a question of fact. The court could not take judicial notice of it, yet, should it be proven, it would become the duty of the court to dismiss the petition as to such lands, because the act indicates that it was not the purpose of the legislature to have them sold. The law says that such lands "shall not be included in the petition," and counsel say that "the owners of such lands have a right to rely upon their not being included." It is urged that this takes all such lands out of the jurisdiction of the court, and that there can be no valid decree against such lands, for the court had no jurisdiction of the subject-matter.

It is a common saying that the proceedings of a court are void where there was no jurisdiction of the subject-matter. Thus, a court of equity could not render a judgment in *assumpsit* or ejectment, or adjudge one guilty of homicide, and punish him criminally for the offense. A justice cannot render a valid judgment for over $100 in a case of tort, nor can he make orders relating to the administration of estates of deceased persons. Instances might be multiplied. In all of these cases, where the want of jurisdiction appears on the face of the proceedings them-

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selves, any court may treat them as void. And it will be found that most, if not all, of the authorities cited by counsel in support of the contention that this judgment was void, rather than voidable, are such cases.

Cooley, Const. Lim. (6th Ed.) 491, says, "A court has jurisdiction of any subject-matter if, by the law of its organization, it has authority to take cognizance of, try, and determine cases of that description." Where there is a want of it, consent cannot confer it. But we have not such a case. It will hardly be pretended that this decree would be void if the defendant had appeared and defended upon the ground relied on, and the court had found the fact against him. But, where the defect does not appear upon the face of the record, the rule is different. A justice has no jurisdiction over civil actions for libel, and he has no jurisdiction in replevin when the value of the property exceeds $100. It goes without saying that any attempt to render a judgment for libel will appear upon the record. The same may not be true in the replevin case. The affidavit and writ may state the value as $100. Yet the property may actually be worth $1,000, and it may be so proven, yet the justice may render a judgment for the plaintiff for nominal damages. The effect is that the plaintiff succeeds in getting an adjudication in replevin concerning property worth $1,000 in justice's court. No one doubts that the defendant's only remedy is by a direct proceeding. He cannot treat the judgment as void, or attack it collaterally upon the ground that the justice had no jurisdiction of the subject-matter. True, that issue was not raised by the pleadings nor upon the trial; the defendant may not have even been served with process, or may not have appeared, or there may have been no testimony tending to show that the property was not worth more than $100; but it will be considered a matter necessarily involved in the adjudication, and therefore not subject to collateral attack. Nevertheless the fact remains that, under the law, the justice had not jurisdiction of the subject-matter, and the defendant's right was to a

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trial elsewhere. The only appreciable difference between such a case and this is that in the replevin case the affidavit alleges that the property is not worth more than $100, while here it is not alleged that the State does not hold the land on a State bid. But that is not conclusive of the question, nor does it follow that it was raised by the pleadings or passed upon at the trial. Indeed, it cannot be raised upon the trial, under the general issue, to oust the court of jurisdiction, and damages to the amount of $500 may be given if return is waived. *Henderson* v. *Desborough*, 28 Mich. 170. Apparently, the court considered the question waived, which is not consistent with the idea that it acquired no jurisdiction. We can hardly suppose that the court meant that the filing of a proper affidavit placed the question of jurisdiction beyond attack. A plea in abatement might raise such an issue, but, in the absence of such an issue, the judgment would be good, and could only be reversed by an appeal, and a plea to the jurisdiction, or some proceeding equivalent thereto.

Another such case is found in Wisconsin. A Wisconsin statute fixed the limit of a justice's jurisdiction in replevin at $200. The affidavit alleged the value at less than $200, but on trial it was found to exceed $200. The court said:

"If the affidavit on which the writ of replevin issued had not stated the value of the chattels, or had stated it over $200, the justice would have taken no jurisdiction, whatever the value might be in fact, and the whole proceeding would have been *coram non judice*. But, because the affidavit stated the value under $200, it gave the justice jurisdiction to issue the writ and to entertain the action, whatever the value of the chattels might be in fact. His jurisdiction of the action rested on the affidavit, independently of the value of the chattels in fact, until his judgment should determine the value. If that had found the value not to exceed $200, the jurisdiction conferred by the affidavit would have continued for all purposes, whatever the value might be in fact. When that found the value to exceed $200, the jurisdiction of the action, derived from the affidavit, ceased for all purposes, except the statutory judgment of abatement, independently of the

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value in fact. But that determination ousted the jurisdiction only thenceforth; it did not operate to defeat the jurisdiction theretofore conferred by the affidavit,—to issue the writ and to entertain the action. Further jurisdiction of the action on the merits ceased, not by the mere fact that the value exceeded $200, but by the judicial determination of the fact. Until such determination, the value stated in the affidavit was conclusive of the jurisdiction." *Darling* v. *Conklin*, 42 Wis. 478, 480.

Van Fleet, Coll. Attack, § 60, says:

"In a court of limited jurisdiction in regard to value of property, if the alleged value is within the limit, the court will have jurisdiction, although the actual value may exceed the limit; and the court may determine that the value is too great, but, after that fact is determined, the court simply loses jurisdiction to proceed further. It does not lose it from the beginning, so as to make all parties trespassers, as it would if its jurisdiction depended upon the fact of value."

But we must conclude from all this, where the jurisdictional defect does not appear upon the face of the record, not that the court has jurisdiction of the subject-matter, but that the assumption of such jurisdiction, though under a mistake of fact, and the rendition of judgment, involve the finding that the necessary facts exist to give jurisdiction, as conclusively as though the issue were expressly made. Suppose the petition alleged that the State did not hold the lands; would we not assume that the same was proved to the satisfaction of the court? And yet it would be no more likely to be than as though it were not alleged. It has been said that:

"Jurisdiction [of the subject-matter] always depends upon the allegations, and never upon the facts. When a party appears before a judicial tribunal and alleges that a certain right is denied him, and the law has given the tribunal the power to enforce that right,—his adversary being notified,—it must proceed to determine the truth or falsity of his allegations. The truth of the allegations does not constitute jurisdiction. The tribunal must have jurisdiction before it can take any adverse step. Its jurisdiction

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necessarily has to be determined from the allegations." Id.

If this is not so, we have the absurdity of being obliged to try the merits to determine the question of jurisdiction. Manifestly, if the allegations are inadequate to confer jurisdiction, the want of jurisdiction appears upon the face of the proceeding. If they are adequate, there is certainly jurisdiction to inquire; *i. e.*, try the question raised by the pleadings. Is it not paradoxical to say that the court has jurisdiction to try the case, but no jurisdiction to render a judgment? And that, notwithstanding the right to try and determine the case, its determination has no force, but may be set at naught by the lowest court in the land, on a trial of the merits, even after affirmance by a court of last resort? Such is the logical consequence of saying that a judgment may be attacked collaterally by matters outside of the record.

In *Reg.* v. *Bolton*, 1 Adol. & E. (N. S.) 66, 72, Lord Denman says:

"Magistrates cannot, as it is often said, give themselves jurisdiction merely by their own affirmation of it. But it is obvious that this may have two senses. In the one, it is true; in the other, on sound principle and the best-considered authority, it will be found untrue. Where the charge laid before the magistrate, as stated in the information, does not amount in law to the offense over which the statute gives him jurisdiction, his finding the party guilty by his conviction in the very terms of the statute would not avail to give him jurisdiction. The conviction would be bad on the face of the proceedings, all being returned before us. * * * But, where a charge has been well laid before a magistrate, on its face bringing itself within his jurisdiction, he is bound to commence the inquiry. In so doing he undoubtedly acts within his jurisdiction. But in the course of the inquiry, evidence being offered for and against the charge, the proper, or, it may be, the irresistible, conclusion to be drawn may be that the offense has not been committed, and so that the case, in one sense, was not within the jurisdiction. Now, to receive affidavits for the purpose of showing this is

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clearly, in effect, to show that the magistrate's decision was wrong, if he affirms the charge, and not to show that he acted without jurisdiction; for they would admit that in every stage of the inquiry, up to the conclusion, he could not but have proceeded, and that, if he had come to a different conclusion, his judgment of acquittal would have been a binding judgment, and barred another proceeding for the same offense. * * * The question of jurisdiction does not depend on the truth or falsehood of the charge, but upon its nature. It is determinable on the commencement, not at the conclusion, of the inquiry."

Mr. Justice Brewer, in the case of *Cooke* v. *Bangs*, 31 Fed. 640, 644, expressed his opinion of the rule as follows:

"A justice of the peace * * * has no jurisdiction to try a man for felony, or to sentence to the penitentiary. That is a subject-matter which is entirely outside of his jurisdiction. If he assumes to try a man for manslaughter, and sentences him to the penitentiary, he is proceeding in a direction which is entirely outside of the scope of his jurisdiction. On the other hand, he may have jurisdiction of assaults and batteries, and does, in most States. Suppose he proceeds to try a man charged with assault and battery, and suppose, in fact, the assault and battery was committed outside of the county over which his jurisdiction extends; then, although his judgment would be erroneous, and in excess of his jurisdiction, yet, having jurisdiction of the subject-matter of assault and battery, and of the person of the defendant, it lies with him to determine whether such particular assault and battery comes within his jurisdiction, and his determination, though erroneous, ought not to subject him to an action for damages. He has jurisdiction of the subject-matter, and it is for him to determine whether the case is within his jurisdiction. He has the right to determine the question; and although he may determine wrongly, and although it may be a case which does not come within the limitation of his jurisdiction, and although he may have exceeded his authority, yet he had the power and the right to determine whether or no he had that jurisdiction, and it cannot be said to be a case wherein the entire subject-matter was outside of his jurisdiction."

The question has been before many courts. Thus, in *Poor* v. *Boyce*, 12 Tex. 440, it was said:

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"The allegations of an administrator's petition to sell land, and not their truth, confer jurisdiction; and, if those allegations are sufficient, all other questions are concluded collaterally."

See, also, *Stuart* v. *Allen*, 16 Cal. 473 (76 Am. Dec. 551).

Again:

"An allegation of citizenship of another State gives the federal court jurisdiction, and the falsity of such allegation does not make the judgment void." *Erwin* v. *Lowry*, 7 How. 172.

"Where the jurisdiction of a court to lay out a highway depended upon the refusal of the selectmen so to do, a judgment laying it out is not void because the petition was false on that point." *Huntress* v. *Effingham*, 17 N. H. 584.

In *State* v. *Gary*, 33 Wis. 93, a person was summoned before a county judge in Wisconsin, to be examined in regard to his property for purposes of taxation. He claimed that, on account of his residence being in another State, he was not liable to be taxed, and applied for a writ of prohibition, on the ground that the judge had no jurisdiction. But the court said that the jurisdiction "depended wholly on the making and presentation to the judge of the affidavit and other papers required by the statute," and not upon the facts.

The most that can be said is that, in a statutory proceeding like this, "we must be able to gather from the allegations, either directly or inferentially, that the party was seeking the relief granted, or that he was entitled thereto." Mr. Van Fleet (Coll. Attack, §§ 61, 62) says:

"A large number of cases are cited in chapter 8, *infra*, where the judgment is not void, although the affidavit, complaint, or petition showed affirmatively that the plaintiff had no cause of action whatever. These illustrations show that there is no connection between jurisdiction and sufficient allegations. In other words, in order to 'set the judicial mind in motion,' or to 'challenge the attention of the court,' it is not necessary that any material allegation

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should be sufficient in law, or that it should even tend to show facts that are sufficient. If that were the rule, the absence of any material allegation would always make the judgment void, because it cannot be said that such a complaint has any tendency to show a cause of action. It will be seen from the cases about to be cited that, when the allegations are sufficient to inform the defendant what relief the plaintiff demands,—the court having power to grant it in a proper case,—jurisdiction exists, and the defendant must defend himself. Thus, in Indiana, where a judgment of the board of county commissioners establishing a gravel road was attacked collaterally on account of a defective petition, the court said: 'If there was any petition at all, invoking the action of the commissioners, its sufficiency cannot be collaterally questioned.' *Ricketts* v. *Spraker*, 77 Ind. 371, 374. A judgment declaring a person insane is not void, when the whole proceeding shows enough to 'fairly inform' the defendant and his friends that the claim was that he was insane, and that an inquiry thereon was to be held. *In re Latta*, 43 Kan. 533. 'If the petition sets forth facts sufficient to challenge the attention of the court with regard to its merits, or to authorize the court to deliberate with respect thereto,' its judgment will not be void. *Head* v. *Daniels*, 38 Kan. 1. If a complaint to sell land for taxes is sufficient 'to challenge the attention of the court,' a judgment thereon is not void because the complaint would have been bad on demurrer. *McGregor* v. *Morrow*, 40 Kan. 730. In an early case the supreme court of Illinois, in speaking of a collateral attack on a guardian's sale of land, said: 'Enough must appear, either in the application or the order, or at least somewhere upon the face of the proceeding, to call upon the court to proceed to act; and all agree that, when that does appear, then the court has properly acquired jurisdiction, or, in other words, is properly set to work.' *Young* v. *Lorain*, 11 Ill. 624 (52 Am. Dec. 463). If enough appears 'to call upon the court to proceed to act' (*Mulford* v. *Stalzenback*, 46 Ill. 303, 307), or if the allegations were sufficient 'to cause the judge to act' (*Galena, etc., R. Co.* v. *Pound*, 22 Ill. 399, 414), in a special proceeding, or if there was 'something stated to amend by' (*Spoors* v. *Coen*, 44 Ohio St. 497), the proceeding is not void collaterally. But in the cases above mentioned, where the allegations showed affirmatively that no cause of action existed, the attention of the court was not challenged, nor was it called upon

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to act, by any material allegation, nor was there any such allegation to amend by. Hence I conclude that allegations immaterial and wholly insufficient in law may be sufficient 'to set the judicial mind in motion,' and to give a wrongful but actual jurisdiction, which will shield the proceedings from collateral attack. It seems to me that the Indiana case above cited, which was a special statutory proceeding before a board of inferior and very limited judicial power, announces the true and only logical rule, namely, that if there is any petition at all, invoking the action of the court, its judgment is not void.

"The courts of New York are not able to stand by their early rule that, where a single material allegation is omitted from a petition in a special proceeding, it is void. Thus, a fine for the violation of an ordinance was collaterally attacked because the board had no power to pass it. The court, assuming that to be true, said: 'The justice of the peace had jurisdiction of the subject-matter of the action, being for the recovery of a penalty less than two hundred dollars. * * * The jurisdiction of the magistrate was not derived from, and did not depend upon, the act which is challenged, but upon the general statutes of the State.' *Hallock* v. *Dominy*, 69 N. Y. 238, 240. In other words, having the defendant before him, and having jurisdiction to grant the relief demanded in a proper case, his judgment was not void, even though the allegations showed affirmatively that no cause of action existed in that case. This being a special statutory proceeding in restraint of personal liberty, how the logic on which this case rests can be reconciled with the earlier decisions it is difficult to understand. If a special proceeding is not void where the petition shows affirmatively that no cause of action exists, it would seem to follow, as a necessary sequence, that the failure of the petition to show a cause of action on account of the absence of one or more material allegations would not make it void. * * *

"The supreme court of California said: 'The first point decided by any court, *although it may not be in terms*, is that the court has jurisdiction; otherwise, it would not proceed to determine the rights of the parties.' *Clary* v. *Hoagland*, 6 Cal. 685, 688. The supreme court of Wisconsin having erroneously determined that it had jurisdiction (the case not showing the point), and rendered judgment, it was held not void, because the court had power to decide on its own jurisdiction. *State* v. *Waupaca*

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County Bank, 20 Wis. 640. * * * 'Where jurisdiction depends on the finding of a particular alleged fact, the exercise of jurisdiction implies the finding of that fact.' *Thornton* v. *Baker*, 15 R. I. 553 (2 Am. St. Rep. 925). * * * 'The assumption of authority is an assertion of jurisdiction, without any formal statement of the facts essential to give jurisdiction.' *Osborn* v. *Sutton*, 108 Ind. 443, 445. * * * 'Where a court of general jurisdiction assumes jurisdiction, the existence of all facts necessary to confer jurisdiction are presumed to exist.' *Jackson* v. *State*, 104 Ind. 516; *Sims* v. *Gay*, 109 Ind. 501, 503. So, in Alabama, it is said that action of the court implies the previous ascertainment of the preliminary jurisdictional facts, and that its decision on those facts cannot be called in question collaterally. *Wyatt's Adm'r* v. *Steele*, 26 Ala. 639, 650; accord, *Vosler* v. *Brock*, 84 Mo. 574, 578. Judicial action is an adjudication not only of the facts actually determined, but equally so of all precedent matters which should have been determined. *Ney* v. *Swinney*, 36 Ind. 454. * * * The Supreme Court of the United States, speaking of a collateral attack on an administrator's sale of land made in obedience to a private statute, said: 'In making the order of sale, the court is presumed to have adjudged every question necessary to justify such order or decree, viz., the death of the owner; that the petitioner was his administrator; that the personal estate was insufficient to pay the debts of the deceased; that the private act of assembly, as to the manner of sale, was within the constitutional power of the legislature; and that all the provisions of the law as to notices which are directory to the administrator have been complied with.' *Florentine* v. *Barton*, 2 Wall. 210, 216. A judgment by default bars the parties as conclusively, collaterally, as though they had framed issues, and had a trial, and been defeated. *Goebel* v. *Iffla*, 48 Hun, 21. The assumption of jurisdiction and the exercise of authority is a decision upon the question of notice, without any formal entry declaring the notice sufficient. *Updegraff* v. *Palmer*, 107 Ind. 181, 182; *Jackson* v. *State*, 104 Ind. 516, 520. * * * Collaterally, an administrator's order to sell land is an implied and conclusive adjudication that the sale was necessary, and that notice was duly given (*McDade* v. *Burch*, 7 Ga. 559, 50 Am. Dec. 407); and an order granting relief is an adjudication of every fact essential to the validity of the order. *Reynolds* v. *Faris*, 80 Ind. 14, 19; *Pendleton & Eden Turnpike Co.* v. *Barnard*,

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40 Ind. 146; *English* v. *Woodman*, 40 Kan. 752; *McGregor* v. *Morrow*, 40 Kan. 730. * * * A final judgment in favor of the plaintiff is always an implied adjudication that all his allegations, both express and implied, are true. *Plummer* v. *Inhabitants of Waterville*, 32 Me. 566, 568."

In *Landon* v. *Comet*, 62 Mich. 80, it was held that, "where an objection was made to the right of the circuit judge to sit in the probate court, his assuming to act, ignoring the objection, was an adjudication of his right to do so." See, also, *Miller* v. *Smith*, 115 Mich. 427; *Allured* v. *Voller*, 112 Mich. 357; *Scotten* v. *City of Detroit*, 106 Mich. 564.

In the case before us, the jurisdiction rests upon a statute which confers upon the court the power of determining whether the State has a lien for taxes upon land, and enforcing payment by a decree of sale. It has undoubted jurisdiction in every case where there is an enforceable lien. In a sense, it has no jurisdiction in a case where there is no existing lien which the State has a right to enforce. But, manifestly, the only way of finding out whether the State has such a lien is to try the question, and if, as is contended here, the question may be raised collaterally in any court or proceeding, it follows that these proceedings (in *pro confesso* cases, at least) are decisive of nothing, for the same claim can be made as to any or all parcels of land covered by the decree. The statute prescribes what the petition shall contain. It does not require an allegation that none of the lands are held by the State upon tax bids. It alleges a lien, and prays enforcement, thus impliedly informing defendants that it is claimed that they are subject to such proceedings. The judge decides that they are so, when he includes them in the decree. We must presume that he has found the necessary facts. But there is a mistake of fact. The defendant has not chosen to bring the truth to his attention, or has inadvertently omitted it. But we must presume from the record that the necessary facts

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have been found, and the record cannot be contradicted; otherwise, there would be a premium on not making a defense, for it would be safer. The supreme court of Louisiana said: "Absolute nullities in judicial proceedings are such as result from radical defects, omissions, and irregularities appearing on the face of the record, and are not dependent on matters *in pais*, to be established by evidence *aliunde*." *Stackhouse* v. *Zuntz*, 36 La. Ann. 529, 533. The same point has been decided in many other States. *Hughes* v. *Cummings*, 7 Colo. 203 (a county court judgment); *Earle* v. *Earle*, 91 Ind. 27, 42; *Phillips* v. *Lewis*, 109 Ind. 62, 68; *Kingman* v. *Paulson*, 126 Ind. 507 (22 Am. St. Rep. 611); *Scott* v. *Crews*, 72 Mo. 261, 263; *Byram* v. *McDowell*, 15 Lea, 581, 585; *Stanley* v. *Sharp*, 1 Heisk. 417 (a county court judgment); *Beech* v. *Rich*, 13 Vt. 595; *Ex Parte Bergman*, 3 Wyo. 396; *Welborn* v. *People*, 76 Ill. 516; *Wright* v. *Wright*, 74 Wis. 439.

We think the judgment should stand affirmed.

MONTGOMERY, MOORE, and LONG, JJ., concurred. GRANT, C. J., did not sit.

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WILHELM *v.* VOSS.

1. STATUTE OF FRAUDS—ORIGINAL AND COLLATERAL PROMISES.
   An oral agreement by the owner of a building to pay a subcontractor for his work is binding upon him if such subcontractor abandons his contract with the principal contractor, so as to retain no claim against him, but not otherwise.

2. PRINCIPAL AND AGENT—EVIDENCE.
   Evidence that defendant in an action to recover for plastering a house told plaintiff that he would leave it all to a third person to look after the business for him is sufficient for the submission to the jury of the question of the agency of such third person.

Error to Wayne; McMahon, J., presiding. Submitted April 8, 1898. Decided September 20, 1898.

Assumpsit by Peter Wilhelm against Albert J. Voss for work and labor. From a judgment for plaintiff, defendant brings error. Affirmed.

A. G. Pitts, for appellant.

James H. Pound, for appellee.

HOOKER, J. Van Bogaert & Co. erected a building for Voss, under a contract. When it was ready for plastering, Van Bogaert, accompanied by Domke, who worked upon the house as a carpenter in Van Bogaert & Co.'s employ, went to the house of the plaintiff, when the plaintiff and Van Bogaert, acting for his firm, made a contract whereby the plaintiff agreed to do the lathing and the plastering upon the house for Van Bogaert & Co. The plaintiff hired Bolster to do the lathing, and he suggested to the plaintiff that Van Bogaert & Co. were irresponsible; and thereupon the plaintiff saw Domke, who lived in the family of Voss, and who said that he expected to marry

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his daughter, and occupy the new house when completed, and was assured by him that Voss would see that he was paid before he paid the contractors. The plaintiff also testified that he told Voss himself that "he would not do the job unless he would pay him for the job, because he did not think the contractor was any good," and that "Voss told him that he would pay him if he plastered the house."

The important question in the case is whether this oral promise constituted a valid contract. It is claimed that it is within the statute of frauds. The circuit court held otherwise, and the jury found a verdict for the plaintiff. The statute of frauds makes void any oral promise to answer for the debt or default of another. So that, if we must say that the plaintiff in this case performed his contract with Van Bogaert & Co., thereby making them his debtors under the contract which all agree was made with them, it is manifest that the promise alleged to have been made by Voss was collateral merely, and void because not in writing. The fact that Wilhelm had made a contract with Van Bogaert & Co. to do this work would not necessarily render invalid a subsequent contract with Voss to do the same work, but both of these alleged oral promises to pay for this work could not be valid at one and the same time. Unless the contract with Van Bogaert & Co. was abandoned by Wilhelm, so that there would remain no right to a claim for compensation for the work when done, as against them, the promise alleged of Voss was collateral, and void under the statute.

The right of the plaintiff to recover against the defendant must depend upon the actual state of affairs at the time the work was done. If it was done in pursuance of and under the contract with Van Bogaert & Co., the performance created an obligation against Van Bogaert & Co., and not against Voss; while, if the plaintiff repudiated the contract made with that firm, so that, although he plastered the house, it was done under a different arrangement, and gave rise to no obligation upon the part

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of Van Bogaert & Co. to pay, the defendant would be liable for his promise to pay for the work, if he made such promise. The danger of injustice in this case arises from the opportunity afforded for the plaintiff, after finding himself unable to collect from Van Bogaert & Co., to say that he abandoned his first contract, and relied on the second, when in fact this was an afterthought, to avoid the effect of the statute of frauds. This is, however, a question of fact, and it was proper to submit it to the jury, unless the evidence conclusively showed that the work was done under the contract with Van Bogaert & Co., or that the alleged promise of the defendant was only a collateral promise. In our opinion, there was evidence tending to support the plaintiff's theory, and it was proper to submit these questions to the jury.

Another question in the case requires discussion. Testimony of statements made by Domke, the defendant's son-in-law, was admitted, tending to show that an original promise was made by him, upon behalf of the defendant, and it was claimed that he was the authorized agent of the defendant in the premises. It is now contended (as it was in the circuit court) that there was no proof of agency. The learned circuit judge thought there was such proof, and submitted the question to the jury. We agree with him that there was some testimony to that effect. It is to be found in the testimony of Wilhelm that, at the time Voss and he had their first talk, nothing was said about Domke, but that afterwards he said that he would leave it all to him,—to look after the business for him. This, in conjunction with what occurred, justified the judge in leaving the question to the jury. Had specific objection been made, the testimony that Domke stated that he was the agent of Voss should have been stricken out as hearsay; but the objection included much more, and, as a whole, was not well taken.

Counsel also maintains that the evidence fails to show the value of the services, or that a price was agreed upon. As to this, we are of the opinion that the jury were justi-

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fied in treating 17 cents a yard as the price contemplated by all parties.

The judgment is affirmed.

The other Justices concurred.

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PITTSBURGH & LAKE ANGELINE IRON CO. v. LAKE SUPERIOR IRON CO.

1. INLAND LAKES—RIPARIAN RIGHTS.
   No fixed rule ever has been or ever can be laid down for the division of the territory covered by inland lakes. Each case must depend upon its own peculiar circumstances and facts, and as reasonable a division arrived at as possible.

2. CONTRACTS—MISTAKE OF LAW—OVERRULED DECISIONS.
   Contracts made on the faith of the law as enunciated in a decision of a court of last resort, in the absence of fraud, misrepresentation, or want of knowledge of all the facts, will not be set aside because of a subsequent decision by the same court overruling the former one, since a mistake of law is no ground for relief.

3. BOUNDARIES—ADJUSTMENT—ADVERSE POSSESSION.
   Where disputed boundary lines have been established by express agreement, or under such circumstances that an agreement will be implied, and the parties have for any considerable time recognized them, they will be upheld, though title by adverse possession could not be maintained.

4. SAME—DISPUTE—EVIDENCE.
   Evidence that one of two companies owning land bordering upon a lake requested the other to deed to it such of the land under the waters of the lake as would be included within its subdivision of the section if its lines were projected through the lake, and that the request was refused on the ground that the boundary between the properties should be determined with reference to the rules of riparian ownership, shows that the boundary was in dispute.

5. SAME—ESTOPPEL—STATUTE OF FRAUDS.
   The statute of frauds, which operates to forbid the acquiring of

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title to land by estoppel, has no application to voluntary adjustments of disputed boundaries, to which, therefore, the doctrine of estoppel may be applied.

6. SAME — MINING CORPORATIONS — ALIENATION OF PROPERTY — AUTHORIZATION BY STOCKHOLDERS.

A voluntary adjustment of boundary lines between mining corporations owning property bordering upon a lake, whereby they surrender, respectively, all claim to land on the north and on the south side of a section line projected through the lake, each thereby acquiring territory claimed by the other, the actual ownership of which could be determined only in equity, is not an alienation, division, or sale of the corporate real estate, such as will enable one of the companies to avoid the adjustment under 1 How. Stat. § 4052, on the ground that it was not authorized by three-fifths of the stock.

7. EQUITY — ANNULMENT OF CONTRACT — SUBSTITUTION OF DIFFERENT AGREEMENT.

While a court of equity may annul a contract for fraud or mistake, it cannot substitute therefor a different agreement, fixing the liability of the parties upon a basis not contemplated nor assented to by them.

8. SAME—LACHES.

A delay by a party to seek relief from a contract, of two and a half years after the overruling of a decision in reliance on which it was made, and of nine months after being informed of such overruling by its attorney, during which time the conditions have so changed that it is impossible to restore the *status quo*, is such laches as will defeat its right to relief.

Appeal from Marquette; Stone, J. Submitted April 23, 1898. Decided September 20, 1898.

Bill by the Pittsburgh & Lake Angeline Iron Company against the Lake Superior Iron Company and the Cleveland Iron-Mining Company for an equitable division of the territory formerly covered by the waters of Lake Angeline, and for other relief. From a decree dismissing the bill, complainant appeals. Affirmed.

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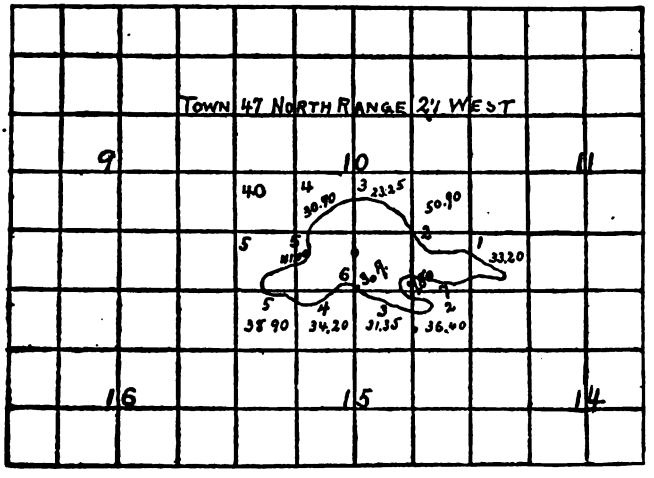
Lake Angeline was situated on sections 10, 11, and 15, township 47 N., range 27 W., and was within the corporate limits of the city of Ishpeming, in Marquette county. It contained 148.61 acres within the government meander lines. It was a mile in length east and west, and 1,690 feet in width on the center line of section 10, which was its widest point. The lake was meandered, and the courses and distances of the meander lines of the original survey are shown by the field notes of the United States government surveyors. The official plat was introduced in evidence. A copy of a part of said plat, sufficient to show the location of this lake upon the sections mentioned, is herewith given. The figures on the map show the number of acres in each parcel according to the government survey.



The three parties to this litigation own all the lands surrounding this lake,—the complainant owning that part of section 15 bordering upon the lake; the defendant Cleveland Iron-Mining Company owning that part of sections 10 and 11 bordering on the lake east of the center line of section 10; and the defendant Lake Superior Iron Company owning that part west of said center line. These

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three mining corporations have owned this land about 30 years, and have been engaged in mining upon their respective properties for more than 20 years. For the sake of brevity, these companies will be designated by their initial letters.

The patent under which the C. I. M. Co. holds its title contains the following description: "The east half of section ten (10) and the west half of section eleven (11), in township forty-seven (47) N., of range twenty-seven (27) W., containing 555 acres and 15-100 of an acre, according to the official plat." The patents under which complainant holds title describe the land as lots 2, 3, 4, and 5 of section 15. The patents under which the L. S. I. Co. derive title described the lands as lots 4, 5, and 6 of section 10.

No ore was known to exist in the bed of the lake until the winter of 1886 and 1887, when the agent of the C. I. M. Co. caused three diamond drill borings to be made through the ice into the rock upon the north side of the lake, resulting in the discovery of iron ore. These borings were not upon territory now claimed by the complainant. Knowledge of this was conveyed to the complainant's agent, but doubts were expressed whether the ore extended into complainant's property. In 1890 complainant sunk a shaft a short distance south of the south line of section 10, adjacent to the southeast arm of the lake, and in 1891 discovered good ore. Drifts were run in various directions, including one to the northwest, in order to ascertain the extent of the ore. These explorations resulted in the probability that the ore would continue northwest, into section 10. This discovery was communicated to the C. I. M. Co. In the latter part of 1892, complainant permitted the C. I. M. Co. to enter its shaft, and drill holes from the south side into the territory north of the section line, and ore of good quality was found. Five holes were thus drilled. In order to keep out the water from its mine at the southeast arm of the lake, complainant contemplated building a cofferdam across this arm,

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and would probably have done this but for the agreement hereinafter referred to. Negotiations were soon thereafter entered into between the parties for pumping the water out of the lake. Mr. B. C. Howell had made a proposition to drain the lake by pumping for $33,000. These negotiations were evidently conducted for some time. The first writing that appears upon the subject was a letter from complainant to the C. I. M. Co., dated at Ishpeming, March 2d, and is as follows:

"*Gentlemen:* Providing you close by March 15, 1892, a contract with B. C. Howell to drain Lake Angeline for $33,000, in full, and only on completion of the work, we will pay you one-fifth (1-5) of such cost, less one-fifth (1-5) the then estimated value of such plant as becomes yours at that time. We also, by reason of not entering into a joint contract to keep the lake bed empty, agree that we will construct a flume to take away all drainage from our side of the section line, and maintain it until the ore on such land, situated under the lake bed, is exhausted. After that you may take the flume without charge, and care for it as you see proper.

"Yours truly,

"PITTSBURGH & LAKE ANGELINE IRON CO.,

"By Thos. Walters, Sup't."

This proposition was indorsed as follows:

"Conditions accepted.

"CLEVELAND IRON-MINING COMPANY,

"By F. P. Mills, Agt."

Upon a petition, signed by all the parties, to the common council of the city of Ishpeming, the following ordinance was adopted on March 16, 1892:

"An ordinance granting permission to the Cleveland Iron-Mining Company, the Lake Superior Iron Company, and the Pittsburgh & Lake Angeline Iron Company to pump out and permanently drain Lake Angeline.

"*Whereas*, the Cleveland Iron-Mining Company, the Lake Superior Iron Company, and the Pittsburgh & Lake Angeline Iron Company, by *mesne* conveyances from the original patentees of the United States, severally own all

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the land surrounding Lake Angeline, which said lake is situated within the corporate limits of the city of Ishpeming, and therefore, exclusively, severally own the bed of said lake, as follows, to wit: The said the Cleveland Iron-Mining Company, all that portion of the bed of said lake lying east of the center line of section ten (10) as projected through said lake, and north of the south line of section ten (10) and section eleven (11), township forty-seven (47) north, of range twenty-seven (27) west, as so projected; the Lake Superior Iron Company, all that portion of the bed of said lake lying west of the center line of said section ten (10) and north of the south line of said section ten (10) as projected through said lake; the Pittsburgh & Lake Angeline Iron Company, all that portion of the bed of said lake lying south of the south line of said section ten (10) as projected through said lake, and the surface right of lot six (6) of said section ten (10), as acquired by them from the Lake Superior Iron Company.

"*And whereas*, the said three companies desire to pump the water out of said lake, and to permanently drain the same, in order to severally conduct mining operations on the respective portions of said lake bed belonging to each, and desire the formal permission and authority of the common council of the city of Ishpeming so to do, said lake lying and being within the corporate limits of said city:

"*Therefore*, be it ordained, by the common council of the city of Ishpeming:

"SECTION 1. That consent, permission, and authority are hereby given and granted and duly vested in the said the Cleveland Iron-Mining Company, the said the Lake Superior Iron Company, the said the Pittsburgh & Lake Angeline Iron Company, and their respective successors and assigns, to pump out and drain away the water of the said Lake Angeline, and, thereafter, to permanently drain the same, and to maintain and operate the necessary machinery and pumping apparatus and appliances so to do: *Provided*, that the water pumped out of said lake and permanently drained therefrom shall be carried away through the present outlet of said lake into Carp river.

"SEC. 2. This ordinance shall take effect from and after the passage thereof."

The petition set forth the ordinance in full.

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On the following day the parties executed an agreement, the material parts of which are as follows:

"This agreement, made this 17th day of March, A. D. 1892, by and between the Cleveland Iron-Mining Company, first party, the Lake Superior Iron Company, second party, and the Pittsburgh & Lake Angeline Iron Company, third party, all corporations organized under the laws of the State of Michigan, *Witnesseth:*

"*First.* That *whereas*, the three parties to this agreement severally own all the land surrounding Lake Angeline, in the county of Marquette, State of Michigan, and, iron ore having been discovered under the bed of said lake, it has become necessary to pump out the water of said lake, and permanently thereafter drain the bed thereof, in order that each of the parties hereto may economically mine such ore as lies under such portions of said bed as each of said parties is respectively entitled to.

"*Second.* And *whereas*, one B. C. Howell, prior to the date of this contract, had a large pump suitable for such work, and proposed to said first party to contract to pump out said lake, and to sell said pump and necessary appliances, all for the sum of thirty-three thousand dollars ($33,000), provided he could begin operations immediately, while firm ice remained in said lake, so as to furnish the necessary support for placing the proper timber work in position; and *whereas*, said first party, after communicating with said second and third parties and getting their approval, has entered into a contract with the said Howell to pump out the water of said lake, and to purchase said pumping apparatus and appliances, for said sum, thus making a large saving in the cost thereof; and *whereas*, the cost of the continuous drainage of the bed of said lake, after the water thereof is pumped out, is now impossible of ascertainment, and the parties hereto are desirous of fixing the proper proportion of expense, both of the purchase of said pumping apparatus and of the pumping out of said lake, and of the cost of the continuous or permanent drainage of the bed thereafter, to be borne by each, the same being for the mutual benefit of all:

"Now, *therefore*, the parties hereto, in consideration of the premises, and of mutual considerations received by each from each, the receipt of which is hereby respectively acknowledged, hereby agree as follows:

"*Said first party agrees: First.* To bear and pay

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eight-fifteenths (8-15) of the entire cost of the purchase of said pump and apparatus, and of the pumping out of said lake, under the arrangement with the said Howell, to wit, the sum of seventeen thousand six hundred dollars ($17,600), and eight-fifteenths (8-15) of any additional cost which may be necessarily incurred in the premises, and will also bear and pay one-fifth (1-5) of the value of said pump and appliances after the lake is pumped out, which one-fifth (1-5) thereof is to be deducted, as hereinafter provided, from the amount to be paid by said third party. *Second.* After said lake is once pumped out by said Howell, to maintain and operate the said pumping apparatus and plant for the continuous and permanent drainage of the bed of said lake, advancing all necessary expenses for such maintenance, operation, and repairs, and, at the end of each calendar year, to pay and bear such a proportion of the cost thereof during the year preceding as the total number of tons of ore mined and produced by said first party from that portion of the said lake bed belonging to it during said year bears to the total number of tons of iron produced and mined during such year by said first and second parties jointly from the bed of said lake, and, further, to bear and pay two-thirds (⅔) of the cost of any additional or other apparatus which may be needed for the permanent drainage of said lake.

"*Said second party agrees: First.* To bear and pay four-fifteenths (4-15) of the entire cost of the purchase of said pump and apparatus, and of the pumping out of said lake, under the arrangement with the said Howell, to wit, the sum of eight thousand eight hundred dollars ($8,800), and four-fifteenths (4-15) of any additional cost which may be necessarily incurred in the premises. *Second.* To bear and pay to said first party, on settlements to be made at the end of each calendar year, such a proportion of the entire cost of maintaining, operating, and repairing the plant for the permanent drainage of said lake bed as the total number of tons of iron ore produced and mined by said second party from that portion of the lake bed owned by it during such year bears to the total number of tons of iron ore produced and mined by said first party and said second party from the entire lake bed during such year, and also to bear and pay one-third (⅓) of the cost of any additional or other apparatus which may be needed for the permanent drainage of said lake.

"*Said third party agrees: First.* To bear and pay three-fifteenths (3-15) of the entire cost of the account to

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be paid to the said Howell under the arrangement of said first party with him, to wit, three-fifteenths (3-15) of the said thirty-three thousand dollars ($33,000), namely, the sum of six thousand six hundred dollars ($6,600), and three-fifteenths (3-15) of any additional cost which may be necessarily incurred in the premises, less one-fifth (1-5) of the value of said pump and appliances purchased from the said Howell under the arrangement with him, the value of which is to be estimated as soon as the first drainage of said lake is completed. *Second.* To erect and maintain a proper and sufficient flume, so constructed above the present water level of Lake Angeline as to divert and carry away all the surface water or other surface drainage which would otherwise come into the present bed of said lake from all the land lying above the present water level of said lake, and south of the south line of section ten (10) as projected through said lake, and also to run into said flume any and all water which the said third party may pump from its mine or mines; which said flume said third party agrees to maintain and keep in repair and in successful operation, diverting such drainage from the bed of said lake, until the iron ore to which said third party is entitled, lying on, in, or under the portion of the bed of said lake lying south of the said south line of said section, is mined and exhausted, and then to turn over said flume in good repair to the said first and second parties hereto, without charge, and to allow them thereafter to operate and maintain the same for the purpose of continuing said drainage, giving the employés of said first and second parties free access in and to said flume for the purpose of maintaining, repairing, and operating the same, allowing them to make such alterations in said flume, and in the direction of the same, as may be necessary to successfully accomplish such drainage."

This agreement was signed, sealed with the corporate seal, and acknowledged with all the formalities of a deed. The certificates of acknowledgment stated that the president and secretary of each company acknowledged—

"That they duly executed the foregoing instrument for and on behalf of said corporation, duly authorized thereto, and that the same is the free act and deed of said corporation, and the free act and deed of themselves as such officers."

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The contract was carried out, and the drainage completed December 24, 1892. The total cost of draining and of keeping the water pumped out until January 1, 1897, was $76,488.38. Of this, the C. I. M. Co. paid $44,149.68; the L. S. I. Co., $17,147.18; and the complainant, $7,601.38; the balance of $7,590.14 being left for adjustment between the defendants. The water under the southeast arm of the lake was comparatively shallow. A vast body of mud was found in the bottom of the lake, and the two defendants incurred an expense, in attempting to remove it, of $20,227.53. After the execution of this contract, each party worked upon its own property as defined thereby. The complainant mined out all the valuable ore under the southeast arm, and afterwards filled its opening with the waste rock. The L. S. I. Co. made explorations at considerable expense, and the C. I. M. Co. made the five drill holes above referred to from the complainant's mine, and ran a drift through the rock underneath the lake nearly to the south line of section 10, and, after reaching ore, ran drifts and cross-cuts, with a view to determining the value of the ore, and ascertaining if there was sufficient to open and equip a mine. All this involved large expense.

The section line was regarded as the line dividing these properties. Nails were driven in the timbers underground to indicate the line. In 1894 complainant made an innocent trespass north of the line, for which an amicable settlement was made. In 1896 the C. I. M. Co. trespassed upon complainant's property south of the line, and amicably settled for it. Maps were frequently exchanged with each other. Complainant asked and obtained permission from the C. I. M. Co. for the construction of a railroad track north of the section line, which was constructed and has ever since been in operation by complainant. On March 21, 1894, the C. I. M. Co. executed a lease to complainant, granting it the right to use land north of the section line for stock-pit grounds, and the erection of temporary structures for mining purposes. Other acts

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also were done by the respective parties in recognition of the fact that the south line of section 10 was the boundary line, as stated in the above agreement. This state of affairs continued until in November, 1896, when complainant served a notice upon the defendants that it claimed title to certain lands north of the section line.

One other fact should here be noticed. Complainant commenced mining on lots 4 and 5 in 1863. The hill was very near the shore of the lake, and complainant dumped its waste rock into the lake, and filled in several acres north of the section line. Upon this made land north of the line it erected some buildings, the most of which it removed to the south of the line in 1887.

Complainant filed its bill of complaint November 23, 1896. Issue was duly joined, proofs taken, and decree entered dismissing the bill.

Clark & Pearl (*Alfred Russell*, of counsel), for complainant.

Ball & Ball (*Benton Hanchett*, of counsel), for defendant Lake Superior Iron Company.

George Hayden (*Hoyt, Dustin & Kelley*, of counsel), for defendant Cleveland Iron-Mining Company.

GRANT, C. J. (*after stating the facts*). The theory of the complainant's bill is that the territory formerly covered by the waters of this lake should be divided among the shore owners in proportion to the amount of shore frontage owned by each; that such ownership extends to the center of the lake, to be equitably established by the court; and that such territory should be partitioned by convergent lines drawn from the outside limits of each frontage to a convergent point called the "equitable center." To the bill is attached a map purporting to contain such equitable division.

The equitable center is placed a short distance east of the center line of the section, and about 12.84 chains north

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of the south line. To this center lines are run from the several points where the meander line crossed the south line of the section. A piece of land in the shape of an obtuse-angled triangle is thus carved out of the bed of the lake upon the southwest quarter of section 10, and contains 14.92 acres. A similar piece is carved out of the southeast quarter of section 10, and contains 10.84 acres. These pieces are claimed by the complainant, while the triangular piece between them, containing 4.05 acres, is apportioned to the L. S. I. Co. by virtue of its ownership of lot 6. The southeast arm of the lake, south of the section line, contained 12.50 acres. The part between lots 4 and 5 and the south line of the section contained 5.57 acres. This apportionment, if adopted, would give the complainant the entire southeast arm of the lake, and from two-thirds to three-quarters of the west arm.

The only reference made in the bill to the agreement above given, or to the action of the parties thereunder, is as follows:

"And your orator further alleges that within the last four or five years, by mutual consent, your orator and the said defendants shared in the expense of pumping out and draining the said inland lake, your orator paying three-fifteenths of said expense, the defendant the Lake Superior Iron Company four-fifteenths, and the defendant the Cleveland Iron-Mining Company the balance, so that now said lake has been drained of water, except what is easily disposed of by moderate pumping."

The claim of the C. I. M. Co. is thus stated:

"1. The patent under which the defendant the Cleveland Iron-Mining Company claims title gave it title to the whole east half of section 10 to the south line thereof, and complainant is barred from objecting to this claim, because it has treated a body of water covering a portion of that territory as of no value, and joined in the draining of the water, as if the land was merely swampy ground, valueable only when reclaimed and made dry land.

"2. Because it has title by adverse possession for more than 15 years.

"3. Because the south section line of section 10 was

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fixed as a boundary by agreement between the parties; that agreement being recognized and evidenced by the pumping contract and its written adjuncts, and was followed by continuous acts of recognition thereof, and expenditures based thereon, by both parties.

"4. Because the pumping contract is an estoppel by deed against the complainant from now asserting title.

"5. Because the complainant is estopped by matter *in pais* from asserting title to the land.

"6. Because the complainant is estopped by its laches.

"7. Because, as a tenant of a portion of the premises in dispute, complainant is estopped to deny defendant's title."

The claim of the L. S. I. Co. is thus stated:

"1. That there has been a practical division of the lake bed between the parties; that contracts, explorations, and mining operations have been carried on on the strength of such division for many years, in which large sums of money have been expended, without any certainty at the time of such expenditures that returns would be realized by the defendants therefrom; and that, by such division and long course of construction between the parties, the complainant is estopped to claim any portion of the lake bed lying north of the section line.

"2. That the pumping contract, executed by the several parties under their corporate seals, and expressly providing that it shall be binding upon the successors and assigns of the several parties, making it a contract running with the land, amounts to a division of the lake bed by deed duly executed by the several parties.

"3. That the pumping contract is so entirely based upon the division of the lake bed above mentioned, and said division forms so essential a part of the contract, that, if such division be set aside or disregarded, the contract itself must fall; that in such case not only is the agreement to continue the drainage of the lake at an end, but either party has a right to demand that the drainage of the lake must stop, and the water allowed to rise to its original level,—a result which, after all that has been done under the pumping contract, and in reliance upon it, would work great injustice to the defendants.

"4. That if the original division of the lake be disregarded, and a new division must be made, such division must be made by the middle line or thread of the lake, in accordance with the common-law rule for division of the bed of fresh-water streams."

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The situation is anomalous, and the books present no similar case. In March, 1892, the parties entered into an agreement to extinguish the lake by pumping out the water, leaving the territory dry ground. They agreed upon an apportionment of expense substantially according to the territory within the lines of the government survey. The lake no longer exists. Nearly five years after, this suit is planted upon the theory that the lake exists, and that the court must make an equitable division from a common equitable center. All the parties, however, seem to have discussed the question as of a lake actually in existence.

The difficulty in apportioning the territory according to the theory of complainant is apparent from its irregular form. It seems conceded by the learned counsel for the complainant that the division according to the diagram made a part of its bill cannot be sustained, because they concede that it may be more equitable to divide the two arms of the lake according to the river rule, viz., the *medium filum aquæ*. It must also be conceded that the C. I. M. Co., under this rule, would be entitled to some of the territory lying under the southeast arm of the lake south of the section line. In this territory the complainant, in 1891, discovered valuable ore, which it has mined through its shafts, levels, and drifts. Complainant has no means of ascertaining how much ore was taken from this territory, part of which, under its theory, belongs to the C. I. M. Co. Part of the territory has caved in, and the rest is filled with waste rock.

The distance from the south section corner, between sections 10 and 11, to the meander line, is 125 feet. The meander line then runs from the south section line, in a northwesterly direction, 225 feet, and thence to the northeast. Complainant's proposed line of division upon the northeast almost entirely cuts off this frontage of the C. I. M. Co. Another complication results from the fact that the C. I. M. Co. is the owner of a small piece of land in the southwest corner of the southeast quarter of section 10, which is 100 feet in length on the section line.

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No fixed rule ever has been or ever can be laid down for the division of the territory covered by these inland lakes, with their irregular shores. Each case must depend upon its own peculiar circumstances and facts, and as reasonable a division arrived at as possible.

The manner in which the equitable center was established in this case appears from the testimony of one of complainant's own witnesses, Mr. Bradt, an engineer:

"*Q.* How did you locate your center point in the lake? What guided you?

"*A.* I refer you to Mr. Clark, our attorney.

"*Q.* What did he tell you to do to find that center point?

"*A.* He didn't tell me to find it; he found it himself.

"*Q.* How did he find it?

"*A.* You will have to ask him.

"*Q.* What did he tell you about that point? What information did he give you?

"*A.* He simply asked me to compute courses and distances that would converge at a point that he selected and designated.

"*Q.* Did he tell you the angle to make?

"*A.* No, sir.

"*Q.* Now, I wish you would give us just what Mr. Clark gave to you as a basis from which you did that work.

"*A.* Mr. Clark located upon the map a point that might be considered the equitable center, and I was, from that point, to compute courses and distances from the section line which would converge or meet at that point."

This same witness also admits that the apportionment on his diagram deprives the C. I. M. Co. of any frontage on the southwest shore of lot 7.

The above statement is sufficient to show the difficulty in making an equitable apportionment, and while nothing was said during the negotiations leading up to the agreement, or in the agreement itself, in regard to the difficulty, it may have had much to do in the minds of the officers and agents of the respective parties in fixing the terms of that agreement. That contract was a deliberate settlement of the boundary line between the lands of the three

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companies, and was so understood. It was of the utmost importance to these parties that the boundary line be settled beyond any possible doubt. Complainant had discovered a mine on its territory south of the line, and extending under an arm of the lake. At that time it was the only one which it was known would be benefited by the removal of the water. No ore of sufficient value to mine had been found under the lake north of the line. After the removal of the water would come extensive and very expensive explorations, to determine whether there existed under the bed of the lake ore worth mining. The contract, if valid, established the line beyond dispute.

The first obstacle for the complainant to remove, before resorting to an equitable apportionment, is this contract, recognized as valid and acted upon for nearly five years by all the parties. It attempts to do this by asserting that in making that contract it relied upon the case of *Clute* v. *Fisher*, 65 Mich. 48, as establishing the rule that the territory should be divided by the government lines, and that it rested upon that case as the established law until the decision of *Grand Rapids Ice & Coal Co.* v. *South Grand Rapids Ice & Coal Co.*, 102 Mich. 227 (25 L. R. A. 815, 47 Am. St. Rep. 516), claiming that the latter overruled the former, and that in making that contract there was a mutual mistake which entitles it to the relief prayed. The former case was decided in February, 1887, and the latter in September, 1894. This claim depends upon the testimony of Mr. Kidder, the superintendent of complainant. He testified that, upon learning of the decision in *Clute* v. *Fisher*, he obtained the opinion of Mr. Clark, its attorney, to the effect that the decision established the rule that the government lines controlled; that he thereupon removed some of the buildings which complainant had erected on land made by it north of the section line on the southwest quarter; that he learned of the decision in *Grand Rapids Ice & Coal Co.* v. *South Grand Rapids Ice & Coal Co.* in the last of December, 1895; that he then applied to Mr. Clark for his opinion, which he received February 8, 1896.

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Still complainant waited nearly nine months before asserting title contrary to that defined by the contract. Upon this subject Mr. Kidder further testified:

"I accepted Mr. Clark's opinion as final on the subject, so far as to govern my actions. I understood it to be only a matter of opinion. I understood it to be his opinion, but that the decision was definite by the Supreme Court.

"*Q.* So long as the matter remained in an opinion, it was a matter of doubt, wasn't it?

"*A.* Yes.

"*Q.* You were also aware of the fact that the courts sometimes change their opinions, were you not?

"*A.* I have very frequently thought that, with reference to this very thing, the Supreme Court might change sometime.

"*Q.* And rather than investigate any further, or raise any question about it, you concluded to accept the opinion as rendered by Mr. Clark. Is that it?

"*A.* Yes; that is so."

In *Clute* v. *Fisher* the lake contained 32.68 acres. Plaintiff owned about three-fourths of the frontage. Defendant owned no land fronting upon it, but claimed that the title was in the State. The question of the division of the lake was not involved. The place where the ice was cut was conceded to be in territory owned by the plaintiff, unless his title was limited to the meander line. A diagram of that lake is found in 102 Mich. 231, and the issue clearly stated in the opinion of Chief Justice McGrath. An examination of the briefs shows that the question of a division among the riparian owners was not mentioned. That part of the opinion was therefore mere *dicta*, and was an erroneous statement of the law, as was subsequently held in the case between the ice companies. The mere *dicta* in the opinions of courts are not controlling. It may, however, be conceded that the statement of the learned justice who wrote the opinion, which was concurred in by the entire court, might fairly be considered as enunciating the law in this State applicable to inland lakes of such size, while it also recognized the correct rule in larger lakes. The Supreme Court of the

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United States so accepted it, as is evident by their reference to it in *Hardin* v. *Jordan*, 140 U. S. 398.

We will first discuss and dispose of the question raised upon the theory that complainant relied upon the decision of *Clute* v. *Fisher* as an authoritative enunciation of the law in its negotiations and contract with the defendants, and that all the parties so understood it. The following, then, is the situation: We find that the parties, in reliance upon that case, entered into a deliberate contract establishing their boundary lines and determining the amount of territory belonging to each. Complainant made the contract with knowledge that it gained territory south of the line, known to be valuable, while it surrendered territory north of the line, not then known to possess any value. All parties are chargeable with knowledge that each was to incur risks of its own, make its own expenditures upon its own land according to the agreement, and, by reason of its expenditures and improvements, would be placed in such a position that it could not be restored to its former *status quo*. The anticipated result came. The explorations, expenditures, and improvements were made, each company making them at its own risk. It is impossible to restore the *status quo* or to render exact justice between the parties, because the *data* are not in existence. It is doubtful if a result approximately correct could be reached upon an accounting. It would be impossible to determine its correctness, within many thousands of dollars. The result of complainant's contention would be that, whenever any case had been overruled, every transaction or agreement based upon that decision may be set aside by the courts, if not barred by the statute of limitations. The agreements and settlements of parties, made with full knowledge of the facts and in reliance upon the law, ought to be as binding as the judgment of the court in a particular case. If ten other similar suits had been pending when *Clute* v. *Fisher* was decided, and judgments had been rendered in reliance upon that decision, the courts could not now set them aside. The law is not

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so unstable as to permit such results. Judgments rendered and contracts made upon the faith of the law as enunciated in the decision of a court, in the absence of fraud or misrepresentation, must stand. When that decision is overruled, the overruling decision controls only subsequent transactions. Such is the rule recognized by the decisions and text-writers.

"The general rule certainly is (as has been very clearly stated by the Supreme Court of the United States) that a mistake of the law is not a ground for reforming a deed founded on such a mistake; and, whatever exceptions there may be to this rule, they are not only few in number, but they will be found to have something peculiar in their character, and to involve other elements of decision." 1 Story, Eq. Jur. § 116.

"Upon a close survey, many, although not all, of the cases in the latter predicament will be found to have turned, not upon the consideration of a mere mistake of law, stripped of all other circumstances, but upon an admixture of other ingredients, going to establish misrepresentation, imposition, undue confidence, undue influence, mental imbecility, or that sort of surprise which equity uniformly regards as a just foundation for relief." Id. § 120. See, also, Id. § 128.

Kent, the learned chancellor, said:

"A subsequent decision of a higher court, in a different case, giving a different exposition of a point of law from the one declared and known when a settlement between parties takes place, cannot have a retrospective effect and overturn such settlement. The courts do not undertake to relieve parties from their acts and deeds fairly done on a full knowledge of facts, though under a mistake of the law. Every man is to be charged, at his peril, with a knowledge of the law. There is no other principle which is safe and practicable in the common intercourse of mankind. And to permit a subsequent judicial decision in any one given case, on a point of law, to open or annul everything that has been done in other cases of the like kind, for years before, under a different understanding of the law, would lead to the most mischievous consequences. Fortunately for the peace and happiness of society, there is no such pernicious precedent to be found. This case, therefore, is to be decided according to the existing state

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of things when the settlement in question took place." *Lyon* v. *Richmond*, 2 Johns. Ch. 51.

An examination of the cases cited by complainant's counsel will show that there were other considerations in them besides a naked mistake of law. To analyze them would make this opinion unnecessarily long. A brief reference to two will suffice. In *Whelen's Appeal*, 70 Pa. St. 410, there existed a failure to furnish evidence for which the applicant called and to which she was entitled. The court refers to the well-settled principle, and says:

"This doctrine, though founded on principle and supported by authority, will not be allowed to bar the way to relief, where the party seeking to avoid the consequences of his own deed shows that he has acted upon a want of proper knowledge, which he was not able to obtain, though vigilant and diligent in his search for it, or where information to which he was entitled, and which was necessary to the formation of a correct judgment as to the performance of a proposed act by which his rights are to be affected, has been withheld from or refused to him. * * * It is clearly settled that where, with a mistake in law, there is found mixed up other ingredients, showing misrepresentations, stating that which is not true, or concealing that which ought to have been made known; where imposition, undue influence, mental incapacity, or surprise are established,—relief will be afforded to one who has thus been imposed upon and induced to do that which it is contrary to equity to maintain."

In *Blakeman* v. *Blakeman*, 39 Conn. 320, petitioner purchased of defendant land, including a right of way through a lane, and paid a greater price than would have been paid for the land alone. There had been an appurtenant right of way, which had ceased by operation of law. The defendant represented that the way still existed, and would pass by the deed. The court says: "Both parties were mistaken in relation to the fact of the existence of the way,—a mutual mistake."

This case is stripped of all other circumstances. It contains no element of misrepresentation, imposition, suppression, undue influence, undue confidence, imbecility, or

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surprise. Neither said or did anything to mislead the others. Each acted with deliberation and with complete knowledge of all the facts. The sole basis of complainant's claim is that the decision of this court, upon the faith of which the contract was made, was subsequently overruled. We recognized the rule in *Ingles* v. *Bryant*, 117 Mich. 113. We declined to reopen a chancery case, where a decree had been entered in this State by mutual consent, upon the faith of a decision of the supreme court of Ohio. Subsequently this court held directly to the contrary. It was decided that the consent decree, acquiesced in for three years, was conclusive upon the parties. Why should not a voluntary settlement out of court be as conclusive as the like settlement made in court? We are therefore of the opinion that this case does not come within any exception to the rule that a mistake of law does not furnish any ground for relief.

Do the contract settling the boundary line, and acquiescence therein, and the acts done thereunder, estop complainant to now assert a different line? The rule is settled by the decisions of this court that, where disputed boundary lines have been established by express agreement, or under such circumstances that an agreement will be implied, and parties have for any considerable time recognized them, they will be upheld, though title by adverse possession could not be maintained. *Joyce* v. *Williams*, 26 Mich. 332; *Smith* v. *Hamilton*, 20 Mich. 433 (4 Am. Rep. 398); *Jones* v. *Pashby*, 67 Mich. 459 (11 Am. St. Rep. 589).

According to the testimony on the part of the complainant, there was a dispute as to the boundary line. Mr. Kidder testified that the superintendent of the C. I. M. Co. asked him for a deed of the land lying north of the section line, and that he for his company declined to give it, making the same claim that he now asserts. If his testimony be true, and for this purpose the company must stand by its own testimony, there was a dispute, and it

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was settled by the agreement. Complainant recognized it for nearly five years, and saw all these expenditures made by the defendants without protest.

Complainant, however, invokes the doctrine that title to land cannot rest on estoppel on account of the statute of frauds, and that a vote of three-fifths of the entire stock of the company is essential, under the statute, to convey title. The obvious reply to the first proposition is that it is also established that the statute of frauds does not apply to boundary lines, and that the doctrine of estoppel will be applied to the voluntary adjustment of disputed boundaries. *Hayes* v. *Livingston*, 34 Mich. 384. Under the theory of complainant, corporations could not settle boundary lines without a meeting of the stockholders called to pass upon the alienation of its lands, and the doctrine of estoppel could never be applied to a boundary line between corporations or between a corporation and an individual.

So, too, in reply to the second proposition, it may be said that the statute does not apply to the voluntary adjustment of these lines, but to alienation by deed of conveyance. Complainant was not alienating, dividing, or selling any of its real estate, within the language of the statute. 1 How. Stat. § 4052. "Alienation" means, in law, a transfer of title by conveyance. Webst. Dict.; Cent. Dict. The C. I. M. Co. claimed title by virtue of the original patent. Complainant owned no specific piece of land north of the section line, even under its own theory, which could be measured by metes and bounds. How much, if any, it owned could only be determined by agreement or the decree of a court of equity. If it surrendered land north of the line, it gained other on the south. There was no such alienation of lands as required the vote of the stockholders.

The contract was the act of the three parties to it. It was introduced by the complainant as a valid contract. It was executed with all the formalities of a deed. It had the seal of the corporation. Complainant, as well as the

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defendants, paid out large sums of money under it. All are now estopped to deny its due execution and validity.

Another singular result of complainant's contention is this: The annulment of the pumping contract, and the substitution by the court of another in its stead. Courts may annul contracts for fraud or mistake, but they cannot make and substitute others. Complainant did not offer by its bill to have the court fix its proportion of the cost of pumping out the water and mud from the lake, nor define its position upon the contract. Upon the hearing, and after proofs were in, it asked to have the court virtually set the contract aside, and make another one for the parties. The contract was a continuing one, and provided for the continuance of the drainage. Can a court of equity make an agreement for the parties requiring them to keep the water of this lake pumped out, and fix the amount each shall pay, upon a basis which neither contemplated or assented to? Would the parties originally have entered into a contract such as the complainant now asks to be made? In the summer of 1893 the parties disagreed as to the continued liability under that clause of the contract relating to the drainage, and a claim was made against the complainant. Its superintendent replied to this claim by stating that it was under no circumstances interested in pumping out the mud, and that, had such a contingency been stated in the contract, it would not have become a party to it. If complainant would not then tolerate a change in the contract contrary to its understanding, upon what reason can it now ask the court to make one for its benefit, contrary to the express terms of the one the parties made? The court must either affirm the contract *in toto* or wholly set it aside. The foundation of the contract was the settlement of the boundary lines, and the division of the territory and apportionment of expense in accordance therewith. The court cannot set it aside as to the boundary lines, and reform or remake it upon an equitable division of the territory. If set aside, the contract is at an end, and the lake must be left to fill

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up, if either refuses to enter into a new contract. The L. S. I. Co. has discovered no valuable ore. It was willing to assume risks in the hope of finding ore. Though it has found none, it does not seek to avoid its agreement. To that agreement alone it can be held.

Complainant is entirely without equity. It doubted the correctness of the rule of *Clute* v. *Fisher*, and thought that a different rule might some time prevail. It was then its duty to take steps to test the question, before permitting defendants to enter into a contract and explorations involving over $100,000. It should, at least, have informed the defendants of its claim, and given them the opportunity to make a contract with that in view. This claim would not have been heard of unless the C. I. M. Co. had developed a valuable mine. The fact that the venture proved successful after large expenditure creates no equity for this complainant. The skill, energy, and money of that company developed a valuable property. It ought, in justice, to reap the benefit, and the complainant ought to be estopped to participate in the benefit, unless an unbending rule of law prevents. *Twin-Lick Oil Co.* v. *Marbury*, 91 U. S. 592; *Clegg* v. *Edmondson*, 8 De Gex, M. & G. 787. It would not have offered to bear its share of the loss if unsuccessful, nor could it have been compelled to.

Furthermore, it was guilty of laches in keeping silence when it ought to have spoken. Every one is presumed to know the law. Therefore it must be presumed to have known of the law enunciated in *Grand Rapids Ice & Coal Co.* v. *South Grand Rapids Ice & Coal Co.*, *supra*. It had an able attorney, who keeps well versed in the decisions of the courts of this State. Yet it waited 2½ years before asserting its claim, and still 9 months after obtaining the opinion of its attorney that *Clute* v. *Fisher* was no longer the law. It waited until circumstances and conditions have so changed that it is impossible to restore the *status quo*.

Decree affirmed, with costs.

The other Justices concurred.

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RAPID RAILWAY CO. v. CITY OF MT. CLEMENS.

1. STREET RAILWAYS—SWITCHES—REMOVAL.

A street-railway company which is authorized to put in a "Y" at a given street, with the proviso that the company shall, if so ordered by the common council, remove the "Y" within 60 days after service upon it of a copy of an order of the common council directing it to do so, is bound by such agreement, and must remove the "Y" when ordered.

2. SAME—CONSTRUCTION OF ORDINANCE.

An ordinance authorizing a street-railway company to put in "such turnouts, switches, and side tracks as may be deemed necessary," and providing that the whole length of road shall be deemed one route, with a fare not exceeding five cents, does not authorize the construction by such company of a "Y" switch to make a turning point for another street-railway company.

3. SAME—MUNICIPAL OFFICERS—COMMON COUNCIL.

The common council of a city is not bound to assent to the use by a street-railway company of a "Y" switch, which the company constructed between midnight Saturday and midnight Sunday, at the intersection of two of the principal business streets, for the purpose of turning its cars thereon, because the mayor and a member of the street committee had prior knowledge that such a switch was proposed.

Appeal from Macomb; Eldredge, J. Submitted April 26, 1898. Decided September 20, 1898.

Bill by the Rapid Railway Company to enjoin the city of Mt. Clemens and others from interfering with complainant in its operation of certain switches. From a decree dismissing the bill, complainant appeals. Affirmed.

Byron R. Erskine (*Charles M. Swift*, of counsel), for complainant.

Seth W. Knight (*Elliott G. Stevenson* and *Robert F. Eldredge*, of counsel), for defendants.

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MOORE, J. This is a proceeding in chancery, where complainant seeks to have defendants enjoined from hindering or interfering with the operation of complainant's cars over the "Y" switch at the intersection of Cass avenue and South Gratiot streets, and the "Y" on Butler street, in the city of Mt. Clemens. The case was heard in open court. Complainant's bill was dismissed by the circuit judge. From his decision, complainant has appealed.

The complainant for some time has been operating an electric line of street railway from the City of Detroit to Mt. Clemens. It obtained a right of way over the highway occupied by the Detroit & Erin Plank-Road Company from that company. In 1894 an ordinance was granted authorizing complainant to construct a railway track—

"On, along, and through Gratiot street, in this city, from its intersection with the southerly city limits to the southerly line of Cass avenue, and upon such other streets and highways as may be hereafter agreed upon, * * * with all necessary and convenient * * * tracks, turnouts, side tracks, switches, bridges, and culverts."

Section 4 of said ordinance is as follows, viz.:

"That the authority granted by section 1 hereof shall be construed to be authority only to lay a single track on said street, together with such turnouts, side tracks, and switches as may be necessary for the successful operation of said road: *Provided*, however, that the location of said turnouts, switches, and side tracks shall be first approved by the street committee."

It will be noticed this franchise gave to the company no rights north of the southerly line of Cass avenue.

After the franchise was obtained, the company constructed its road. For a time its cars were operated from both ends. While this was done, the company did not have at Mt. Clemens a "Y" or turntable upon which it could turn its cars. Later its cars were equipped to run but one way, and it became desirable to have a "Y" upon which its cars could be turned. Application was made to

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the common council for leave to put in a "Y" at Butler street, which application was granted subject to conditions which will hereafter be stated. The "Y" was put in, and it was the practice of the company to turn its cars at this place, and back them from there to near the south line of Cass avenue, a distance of about 4,000 feet.

At this time the Mt. Clemens & Lake Side Traction Company was operating an electric line of railway on Cass avenue, which passed near the terminal of the complainant. At the intersection of South Gratiot street and Cass avenue is one of the most important business centers of the city. Without consulting the common council, the complainant made an agreement with the president and manager of the Traction Company authorizing it to put in a "Y" at the intersection of South Gratiot street and Cass avenue, which would allow it to turn all its cars. The president and manager were not authorized by any vote of the directors or stockholders to make this contract, and, before the "Y" was put in, they were instructed by the directors not to allow it to be done. The testimony shows this instruction was not communicated to the complainant. It is claimed the mayor and one of the aldermen who was on the street committee had knowledge of the making of this contract. They both testified that, while they knew a connection was to be made between the tracks of the two companies, they did not know it was proposed to put in a "Y" for the purpose of using it as a turning place for the cars. The "Y" was put in between midnight Saturday night and midnight Sunday night. On the following Monday night, the common council forbade the use of this "Y," and it was not used except to a very limited degree. Later the Traction Company refused to allow it to be used at all. Negotiations were had between the two companies and the city looking to the settlement of the differences between them. These negotiations failed. The common council ordered the "Y" on Butler street taken up, as well as the one at the intersection of South Gratiot street and Cass avenue.

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It is the claim of complainant that the "Y" at Butler street is necessary to the management of its road, and that it got some right to put it in by reason of its arrangement with the Detroit & Erin Plank-Road Company. Its application to the common council for leave to put this "Y" in is hardly consistent with this claim. As the Detroit & Erin Plank-Road Company had no rights whatever in Butler street, it is difficult to see how it could confer any rights upon the complainant. The authority to put in the "Y" at Butler street was granted with this proviso: "That said grantee, its successors or assigns, shall, if ordered to do so by the common council of the said city, remove said 'Y' switch within 60 days after service upon it of a copy of the order of the common council directing it to do so." The council ordered this "Y" taken up. The company refused to do what it had agreed to do as one of the conditions of obtaining the right to put in the "Y." It now seeks the aid of equity to prevent having done what it agreed to do. If the writ can be used for such a purpose, why may it not be used after the 30-years franchise granted to the company has expired? The "Y" was accepted with the condition imposed, just as the franchise was accepted with the limitation as to the length of time which it should exist. The railway company is bound by these conditions.

It is claimed, the city having conferred the right to construct the "Y" on Butler street, it cannot now deprive the company of the use of it; citing *Electric Ry. Co. of Grand Rapids* v. *Common Council of Grand Rapids*, 84 Mich. 257. We do not think that case applicable to this one. The city was under no obligation to confer the right to construct a "Y" on Butler street, and, when it conferred that right, it was competent for it to attach conditions which must be observed. Suppose the franchise to construct and operate the road had been limited to 20 years; could it be claimed the company could operate the road after the 20 years had expired, even though the city refused to grant them a franchise to do so? If not, how

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can it be claimed it can operate this "Y" when the condition has arisen when the company agreed it should not be operated? The writ of injunction should not be used to aid the complainant in refusing to carry out its agreement. *Union Street R. Co.* v. *Saginaw Circuit Judge*, 113 Mich. 694.

It is claimed the "Y" at Cass avenue was convenient and necessary to the operation of the road of the Traction Company; that it was competent for that company to make the contract it did with the complainant, and therefore the "Y" should be allowed to remain. In our view of the case, it will not be necessary to express any opinion upon the question of whether the president and manager of the company were authorized by the directors and stockholders to make the contract which they made. Whatever rights the Traction Company had to the use of Cass avenue it obtained by *mesne* conveyances of the rights given by an ordinance to Le Duke and Bishop, and its amendments. The ordinance which conferred the right to Le Duke and Bishop to put in "such turnouts, switches, and side tracks as may be deemed necessary," etc., also provided, in section 7: "The whole length of the road authorized by this ordinance shall be deemed one route, and the rate of fare over said route shall not exceed five cents for each person over five years of age." This indicated very clearly that a connection with some other railway was not contemplated when turnouts and switches were referred to, but that the turnouts and switches needed by the railway to which the franchise was given were intended. This ordinance was amended so as to allow the use of a different kind of rails from those allowed to be used by the original ordinance, and had this proviso: "The manner of laying said tracks and rails and the alignment of same on the street to be subject to the inspection and approval of the common council and the city engineer." The common council and city engineer had no knowledge of the putting in of this work until after it was done, and never approved of it. Whatever may be the

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effect of the contract so far as the two railway companies are concerned,—and upon that question we express no opinion,—the putting in of this "Y" was unauthorized by the city.

The contract made between the Rapid Railway Company and the Traction Company indicated very clearly the purpose of the Rapid Railway Company in making it. It reads:

"*Whereas*, the said Rapid Railway Company desires to put in a 'Y' at the intersection of Cass avenue and South Gratiot avenue, in the city of Mt. Clemens, for the purpose of connecting its line with the line of the Traction Company at this point, so that said Rapid Railway Company may turn its cars: Now, therefore," etc.

The contract also provided:

"The said Rapid Railway Company is to have the privilege of using so much of the track of the said Traction Company as may be necessary to 'Y' its cars at this point, not to exceed a distance of 150 feet east and west from the line of said Rapid Railway Company, and to maintain and renew so much of said track as it may use, if it becomes necessary during the life of this agreement, including paving and repaving."

One cannot read this agreement without coming to the conclusion that the purpose of the Rapid Railway Company in making it was to allow it to turn its cars at this place. The Rapid Railway Company was not authorized by its charter to go north of the southerly line of Cass avenue. This "Y" was put in to make a turning point for the Rapid Railway Company. It was not authorized by the franchise of the Traction Company. Booth, St. Ry. Law, § 56.

Is it possible that the right to turn cars 47 feet long, and weighing 22 tons, at the intersection of the two principal business streets of a city like Mt. Clemens, can be acquired without obtaining the right to do so from the common council? To state the proposition is to suggest the answer. The common council was not consulted.

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While the mayor and a member of the street committee had knowledge that it was proposed to connect the two tracks, they both swear they had no knowledge that it was proposed to put in a "Y" at this point, upon which the cars of the railway companies could be turned. And, even if they had knowledge of its purpose, they were not authorized to confer any authority to put it in. This "Y" was put in between midnight Saturday night and midnight Sunday night. The council at once forbade the use of the "Y," and it never has been used except surreptitiously, or by force, or upon one or two occasions by the permission of the council, it being expressly stated that its use did not give the company any permanent rights.

It is claimed some rights were obtained by virtue of some action of the common council taken in September, 1896. At this time a contract was entered into between the two companies, giving the Rapid Railway the right to run over the tracks of the Traction Company to the lower part of the city. The contract was not to be binding unless the city granted to the Traction Company an ordinance satisfactory to it, nor unless the franchise rights of the Rapid Railway Company were extended so as to permit it to make a loop around the Avery House Square, and other concessions acceptable to the city and the Rapid Railway Company. Afterwards an ordinance was adopted which conferred certain rights upon the Traction Company. It provided the ordinance should be of no effect unless accepted in writing by the Traction Company within 30 days from the passage of the ordinance. The time for its acceptance was afterwards extended, but the company declined to accept the ordinance, and never has accepted it. At the same time this ordinance was adopted, one was passed giving certain rights to the Rapid Railway Company. Among other rights conferred was the right to construct the loop around the Avery House Square, conditioned upon its being done within 90 days; the ordinance not to be binding unless accepted in writing within

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a stated number of days thereafter. The time for the acceptance of this ordinance was extended at the same time the extension was given to the Traction Company, and for the same period. Upon the last day the Rapid Railway Company accepted the ordinance, but it did not build the loop around the Avery House Square within the 90 days, and it is not yet built. It is evident from the record that, when this contract was made and the two ordinances were passed, they were all part of one transaction, and were intended to settle the differences between the two railway companies, and to give the public service to the lower part of the city, and to secure the turning of the cars at the loop provided for in the ordinance. Unfortunately for all the parties, this object was not attained. The contention of the complainant that it is to receive the benefit of this proceeding as though the object of the city in making it had been attained, when it in fact accomplished nothing, is not tenable. The Traction Company did not accept the ordinance. The condition upon which the contract and the ordinance were to be operative failed, and no rights were acquired by reason of what was done.

The decree is affirmed, with costs.

GRANT, C. J., MONTGOMERY and LONG, JJ., concurred. HOOKER, J., did not sit.

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MURPHY v. CHARLTON.

1. MORTGAGES—EVIDENCE.

Complainant and his brothers comprised a corporation which owned certain boats, worth approximately $30,000, that had been libeled and were about to be sold. One of the brothers arranged with K. to advance $10,000 to bid in the boats, under an agreement that he should hold the title to the boats as security for a time, during which such brother was to retain possession; in consideration of which service K. was to receive, upon redemption of the boats, $11,000. K. bid in one of the boats for $13,050, and received a bill of sale of the other from the corporation. It was known to K. that the money to redeem the boats, over and above the $10,000 paid by him, was furnished by complainant. *Held*, that the transaction amounted to a conveyance to K. in trust for complainant, with an interest in K. in the nature of a mortgage interest.

2. SAME—PURCHASER WITH NOTICE.

A sale by K. to defendant, negotiated by the brother in possession, who received nothing therefor, entitled defendant merely to hold in the right of K., subject to complainant's equities; at least if, in subsequent negotiations, the fact that complainant had equities in the boats was recognized by defendant.

Appeal from Wayne; Lillibridge, J. Submitted June 7, 1898. Decided September 20, 1898.

Bill to redeem by William J. Murphy against John Charlton and others. From a decree dismissing the bill, complainant appeals. Reversed.

Moore & Moore, for complainant.

John C. Shaw and *William B. Cady*, for defendants.

MONTGOMERY, J. In February, 1886, the Detroit Tug & Transit Company was the owner of the tug Balize and the schooner Harvey Bissell. Both of these boats

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had been libeled in the United States district court at Detroit. The claims against the Balize aggregated $13,050. The specific amount of the claims against the Bissell does not appear. At this time, Samuel A. Murphy and William J. Murphy and Thomas Murphy owned nearly all the stock of the Detroit Tug & Transit Company, and were the ones chiefly, if not solely, interested in preventing a sale of the boats. At this time they sought one John Kelderhouse, of Buffalo, N. Y., to aid them in securing to themselves the two boats in question. An arrangement was then made by which Kelderhouse, through an agent, bid in the Balize at a marshal's sale, and thereupon the Tug & Transit Company made a bill of sale to Kelderhouse of the Bissell; so that he became at least nominal owner of both boats. At the sale of the Balize, complainant furnished $3,050 of the purchase money, and Kelderhouse $10,000. Complainant also furnished the money to pay off the claims against the Bissell. The boats went into the possession of Samuel A. Murphy, and continued in his possession until September following, when they were conveyed by a bill of sale to William T. M. Charlton, in trust for the other defendants. The Charltons took possession of the boats, and have since controlled the same.

The bill in this case is filed, alleging, in substance, that complainant, intending to become the purchaser of the two boats in question, applied to Kelderhouse for a loan, and that he effected the loan, and that the transfer to Kelderhouse was in trust for the complainant, and as security for the advance of $10,000, and by way of mortgage; that the Charltons took simply the interest that Kelderhouse had; and that the right to redeem from the mortgage continues. The bill also prays for an accounting. The answer denies that the transaction with Kelderhouse amounted to a mortgage, but avers that the agreement was between Samuel A. Murphy and Kelderhouse, and that the advance of $10,000 was not made as a loan, but as the purchase price of the property, and that the agree-

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ment with Murphy was a conditional agreement to sell, and that by this agreement Murphy was not bound to buy, or to repay the $10,000. The answer also alleges that the purchase of the boats from Kelderhouse was absolute and unconditional, and with the consent of Samuel A. Murphy. There seems to be no controversy between the shareholders of the Detroit Tug & Transit Company and the complainant. The circuit judge dismissed the bill, and complainant appeals.

The two questions arising are:

(1) Whether the transaction between Murphy and Kelderhouse amounted to a mortgage, giving to Murphy a right to redeem.

(2) Whether, if the transaction gave to Murphy the rights of a mortgagor, this right has been cut off by the sale to the Charltons.

1. Some stress is laid by defendants' counsel upon the fact that it does not appear clearly that, in the negotiations with Kelderhouse, complainant was named as principal. This circumstance is entitled to this much weight, viz.: The acts of Samuel A. Murphy on behalf of his undisclosed principal, in his (Samuel A.'s) own name, would bind the principal; but, as bearing upon the question of the nature of the contract, it is not of great importance, as we view it. It was known to Kelderhouse that the money to release the boats, over and above the $10,000 paid by him, was furnished by complainant. What was the nature of the transaction? The complainant labors under a difficulty in proving his case, arising from the fact that Samuel A. Murphy, who conducted the negotiations, has since become insane. Mr. Kelderhouse is, however, apparently a candid witness, and a solution of the question depends very much upon an analysis of his testimony. A careful review of his testimony convinces us that the complainant's contention is fully sustained thereby. He testified:

"I was to hold the boats, take a bill of sale of them and hold them as security, for, my impression is, four months; it might have been six months, but not to exceed

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that; and he was to give me for the trouble $1,000, and I was to have, when they were redeemed, when I got my pay, I was to have $11,000, and I was to let him run the boats up to that time, providing he kept them out of debt."

He also testified that Murphy applied to him for a loan, and on cross-examination, in answer to the question, "He was to pay you $11,000 when the loan matured?" he answered, "Yes."

We cannot escape the conclusion that both parties understood that this was a loan, and that Mr. Samuel A. Murphy understood that his principal was obligated to pay the amount, and that, if Mr. Kelderhouse did not know of the fact that Mr. Samuel A. was acting for the complainant, he might have had recourse against Samuel A. or the complainant whenever he discovered that he was the principal. We think this transaction amounted to a conveyance to Kelderhouse in trust in favor of complainant, with an interest in Kelderhouse in the nature of a mortgage interest. See *Jarvis* v. *Woodruff*, 22 Conn. 548; *Horn* v. *Keteltas*, 46 N. Y. 605; *Reed* v. *Bond*, 96 Mich. 134, and cases cited; *Morgan's Assignees* v. *Shinn*, 15 Wall. 105.

2. The question whether the purchase by the Charltons was absolute or made subject to complainant's equities is more doubtful. The defendants claim that their purchase was absolute and final, and they so testify; but there are circumstances which, as the case presents itself to us, cannot be reconciled with this claim. Mr. Kelderhouse testified that, when his claim fell due, he insisted on payment; that Samuel A. Murphy said he would look around, and see what he could do; and that later he returned, and said: "I want you to make the bill of sale out to Charlton Brothers on the boats, and they will pay you for them." The question occurs at once, Why should Samuel A. exhibit the anxiety to place these vessels beyond redemption? Admittedly, the Murphys were paid nothing for any release, and yet, according to the claim of the

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Charltons, Samuel A. was looking for a customer for Kelderhouse to sell to, and to cut off their claim. This spirit would not have appeared so unaccountable if the indebtedness to Kelderhouse equaled the value of the vessels, or nearly equaled it; but it did not. The two vessels were worth $25,000 to $30,000 at the least, and the total claim against them was less than $17,000. It further appears that in subsequent negotiations the Charltons recognized the fact that the complainant had equities in the boats. We cannot escape the conclusion that, whatever the form of the transaction or the language employed, the Charltons were induced by Samuel A. Murphy to invest, and they expected to take the place which Kelderhouse previously occupied, and succeed to his rights.

The complainant was entitled to relief. The decree will be reversed, and the case remanded for an accounting. Complainant will recover costs of this court. The costs of the court below will abide the result.

The other Justices concurred.

BACON v. POMEROY.

PRINCIPAL AND AGENT—AUTHORITY TO COLLECT MORTGAGE.

A negotiable note and mortgage were assigned to a nonresident, with the knowledge of the grantee of the mortgagor. The assignee usually sent to the mortgagee to collect interest as it fell due, and the proceeds of such collections were remitted. On one occasion the assignee authorized the mortgagee to receive and remit a payment upon the principal, which the debtor had expressed a desire to make. Thereafter the debtor, relying on the mortgagee's representation that he was the agent of the assignee, made a further payment on the principal. The assignee retained possession of the mortgage

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and note, and the mortgagee gave receipts in his own name. The latter never accounted for the last payment on the principal. *Held*, that no general authority to collect appeared, and that the payment was at the debtor's risk. MOORE, J., dissenting.

Appeal from Van Buren; Buck, J. Submitted June 8, 1898. Decided September 20, 1898.

Bill by Francis Bacon against Mary A. Pomeroy, William Klett, and others, to foreclose a mortgage. From a decree for defendants, complainant appeals. Reversed.

Bill to foreclose a mortgage. Defense, payment. The note and mortgage were dated January 28, 1889, and executed by George H. Pomeroy to one George E. Breck, for $800. It was a negotiable promissory note, due in five years from date. Breck immediately assigned the mortgage to Francis Bacon, who resided in Waterloo, N. Y. The money loaned belonged to Mr. Bacon as trustee. He did not record his assignment until February, 1896. Defendant Klett purchased the land March 11, 1889, subject to this mortgage. The note and mortgage were sent to Bacon, and were in his possession until the hearing. On February 10, 1893, Klett paid to Breck $400 of the principal, which is the sole subject of dispute here. He made this payment in good faith, assuming Breck to be the agent of Bacon. Breck proved to be a scoundrel, and did not remit the money. The sole questions are: (1) Was Breck the agent of Bacon? (2) Was Bacon's conduct such as to justify Klett in believing him to be such agent?

Heckert & Chandler, for complainant.

Charles E. Sweet, for defendants.

GRANT, C. J. (*after stating the facts*). Breck was not Bacon's agent. Bacon usually sent to Breck to collect the interest as it fell due, and it was paid and remitted.

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Klett lived near Paw Paw, and knew Breck, in whom he placed confidence. He testified that Breck told him he was Bacon's agent. He had no other reason for so believing. He knew that Breck had assigned the note to an Eastern party. Bacon testified that he never authorized Mr. Breck to collect this amount, and had no knowledge of this payment until after Breck's death. Breck gave receipts to Klett in his individual name. On one occasion Klett informed Breck that he desired to pay $100 of principal. Breck wrote to Bacon, and received a letter authorizing him to receive and remit it. Klett did not ask Breck to see the note and mortgage, or if he had them. He knew that the note was negotiable, and that it was transferred, and he had no right to assume that Breck was Bacon's agent to collect the principal. The fact that Klett paid the interest to Breck, and that Breck remitted it to Bacon, is not sufficient to establish the authority to receive the principal, or any part of it, or to justify Klett in believing that Breck was Bacon's agent. The employés in Breck's office testified that they knew of no authority conferred by Bacon upon Breck. Breck's authority was confined by Bacon to express instructions on every occasion. All the transactions between Breck and Bacon are consistent with specific authority and instructions for each case, and do not establish general authority. Aside from this there is nothing to show such general authority. *Terry* v. *Durand Land Co.*, 112 Mich. 665; *Trowbridge* v. *Ross*, 105 Mich. 598; *Bromley* v. *Lathrop*, Id. 496; *Joy* v. *Vance*, 104 Mich. 99; *Church Association of Michigan* v. *Walton*, 114 Mich. 677. Klett could easily have ascertained whether Breck had authority. Instead, he chose to rely upon information given him by Breck. It is he, and not Bacon, who must suffer.

Decree reversed, with costs of both courts, and decree entered here for complainant.

MONTGOMERY, HOOKER, and LONG, JJ., concurred with GRANT, C. J.

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MOORE, J. (*dissenting*). I think the record shows Mr. Breck was authorized to receive the payments, and that the decree should be affirmed.

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GRUNOW *v.* SALTER.

1. LAND CONTRACTS—SURRENDER—JOINT VENDORS.
   An attempt to surrender a land contract by delivering it to one of the vendors upon his suggestion that he will be satisfied to accept the contract and "let the interest go," but will have to consult the other vendor, is ineffectual without the other vendor's consent.

2. SAME—STATUTE OF FRAUDS.
   The interest of contract purchasers in land cannot be surrendered by parol.

Error to Wayne; Donovan, J. Submitted June 10, 1898. Decided September 20, 1898.

Assumpsit by Oliver H. Grunow and Buchanan M. Patterson against Casper Salter and Joseph Salter to recover the accrued interest on a land contract. From a judgment for plaintiffs on verdict directed by the court, defendants bring error. Affirmed.

Franklin L. Lord, for appellants.

James Swan, for appellees.

MONTGOMERY, J. The plaintiffs brought an action to recover the amount of an installment of interest due them by the terms of a written contract for the sale of lands. The defense interposed was a surrender of the contract. The circuit judge directed a verdict for the plaintiffs for the accrued interest, and defendants bring error.

One of the defendants testified to the surrender as follows:

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"That he saw Mr. Patterson prior to giving up the contract, and that Patterson said that he must have either the money or the contract; that upon this occasion Casper Salter was not present; that, some days after, he took the contract to the plaintiffs' store, where he found Mr. Patterson, and told him the contract was there, and, if he was satisfied to take it and let the interest go, he would be satisfied, and that Mr. Patterson said it would be all right, after which he gave Mr. Patterson the contract, and asked for a receipt; that Mr. Patterson did not say anything about consulting his partner; that, after getting the receipt, Mr. Patterson then said he would speak to his partner, and he thought it would be all right; and that, having parted with his contract, he did not know what to do; that, not long after, he received a letter from the plaintiffs asking for interest; that neither of the plaintiffs ever offered him back the contract, and that he did not go back to get the contract."

The testimony of the plaintiff Patterson differs from that of the defendant, in that he disputes any agreement to surrender, but he corroborates the statement that he (Patterson) said he would have to refer the matter to the plaintiff Grunow. He also testifies that he did not in fact have authority to release defendants.

It is evident from defendant's testimony that, before the parties separated, the defendant was informed that the assent of Mr. Grunow was essential to defendants' release, and that he made no dissent from this statement, and left the contract with Patterson upon that understanding. The circuit judge was right in so holding.

The court was also correct in holding that the interest of the defendants as contract purchasers was such an interest in land as could not be surrendered by parol. 2 How. Stat. § 6179; *McEwan* v. *Ortman*, 34 Mich. 325; opinion of CAMPBELL, J., in *Whiting* v. *Butler*, 29 Mich. 144.

The other questions presented relate to rulings in no way affecting the main issue.

The judgment will be affirmed.

The other Justices concurred.

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BELDING SAVINGS BANK *v.* MOORE.

1. TRUSTS AND TRUSTEES—EQUITY—PARTIES.
   A bill to declare a mortgage placed in escrow a prior lien over a deed to a trustee for the benefit of an insolvent bank will not be dismissed for failure to make the bank and its receiver parties, where the trustee is made a party, and enters fully upon the defense claimed by the *cestui que trust*.

2. DEBTOR AND CREDITOR—SECURITY—PREFERENCES.
   A debtor may prefer one creditor to another, and may use any of his property for the purpose of paying or securing his debts, in such order as he may select; and nothing but a distinct lien upon property can prevail against such disposition.

3. SAME—PRIORITY OF LIENS.
   The lien of a prior unrecorded mortgage given to secure a creditor, to be delivered upon a contingency which may never happen, is inferior to that of a deed of trust given to secure another creditor, without notice of the existence of the prior mortgage.

4. MORTGAGES—ESCROW—DELIVERY.
   Where a mortgage is placed in escrow upon the mutual understanding of the parties that it shall be delivered upon the joint request of two persons, one of whom is the mortgagor, the instrument can only be rendered effective by the mortgagor's assenting to its delivery.

Appeal from Kent; Grove, J. Submitted June 10, 1898. Decided September 20, 1898.

Bill by the Belding Savings Bank against Le Roy Moore, Charles F. Morgan, and Thomas J. Potter, to compel the delivery of a mortgage held in trust by defendant Morgan, and to declare said mortgage a prior lien over a deed of the same premises to defendant Potter. From a decree dismissing the bill, complainant appeals. Affirmed.

McGarry & Nichols, for complainant.

Francis A. Stace, for defendant Morgan.

Fitz Gerald & Barry, for defendant Potter.

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MOORE, J. The following statement of facts, taken from the brief of counsel, is justified by the record:

"In June, 1893, the City National Bank of Greenville, of which Moore was president and actual manager, ceased to do business, and was put into the hands of a receiver (Robert T. Gibbons), Moore being then indebted thereto to the amount of $98,000 and upwards. Moore was also then indebted to the complainant bank in the sum of $4,500 on five several notes, none of which, however, were then due, the earliest one to fall due maturing July 16th, and the latest October 15th. Moore, at the request of the receiver, immediately after the bank failed, promised to turn all his property over for the benefit of the bank; and, relying on that promise, the receiver refrained from taking any steps by process of law to enforce the collection of this indebtedness. After all their notes against Moore had matured, and about October 21, 1893, complainant commenced a suit at law in the Montcalm circuit court against Moore, by declaration, to recover the amount due on the notes. To this declaration the general issue was pleaded. Two months afterwards, on January 2, 1894, the complainant procured an attachment to be issued in the same suit; and on the same day lands belonging to Moore in Montcalm county, valued at $15,000, were attached, and on the next following day the lands in question in this suit were also attached in Mecosta county.

"On January 20th, Moore made his application to the circuit judge of Montcalm county to dissolve the attachment; and an order that complainant show cause why it should not be dissolved was made on that application, and Moore also threatened to prosecute the complainant for damages for groundlessly suing out the writ of attachment. The hearing of the application to dissolve the attachment was adjourned on motion of complainant; and pending the adjournment, and about February 5, 1894, an agreement was made between the complainant and Moore that the suit should be discontinued and the attachment released; that Moore should sign and acknowledge a mortgage on the Mecosta county lands in question, and should place the same in the hands of defendant Morgan, to be delivered to Leonard, the president of the complainant bank, when Moore and J. Milton Earle, one of the directors of complainant, should jointly direct Morgan so to deliver it. J. Milton Earle, complainant's witness, states the agreement as follows: 'Mr.

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Moore agreed with us that in case of his being obliged to give any security to any one, or in case of any financial difficulty whereby he would be obliged to secure any one, or in case of any attachment proceedings, or of any danger, as he expressed it, he would deliver the mortgage to Mr. Leonard, or cause Mr. Morgan to deliver it. The agreement was that the mortgage should be delivered to Mr. Leonard, the president of our bank, by the direction of Mr. Moore and myself jointly. That is what I mean when I say that Mr. Moore agreed to cause it to be delivered in that way.' Earle, who represented the complainant at that time, was then advised by Mr. McGarry, the bank's counsel, in whose office and in whose presence this agreement was made, that the complainant bank would have to trust Moore in the matter. Whereupon a mortgage of the lands in question was prepared, and signed and acknowledged by Moore, and was put in an envelope, sealed up, and on the envelope was written:

"'Doctor C. F. Morgan; to be delivered to H. J. Leonard when so directed by Le Roy Moore and J. M. Earle.

[Signed] "'LE ROY MOORE.
"'J. M. EARLE.'

"This envelope was then carried by Moore, accompanied by Earle, to defendant Morgan, to whom it was handed by Moore in Earle's presence, with verbal instruction to hold it until he should be instructed by both Moore and Earle together to deliver it to Mr. Leonard, or give it up to them when they both came after it together, but not to deliver it upon request of either one individually; and Morgan was not informed of the contents of the envelope. Moore retained the possession of the mortgage from the time it was signed and acknowledged until it was by himself placed in Morgan's hands; and it has never been in the hands or under the control of the complainant, nor of any of its officers. The suit at law then pending in the Montcalm circuit court was also discontinued, and the attachment released.

"After this, and about March 29, 1894, Moore, with his wife, executed and delivered to the defendant Potter a deed of conveyance of his property, real and personal, in trust to convert the same into money, and, after payment of expenses, to pay the same to the receiver of the City National Bank of Greenville on the indebtedness and liability of Moore thereto; the balance, if any remained after

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paying such liability, to be returned to Moore. This deed was duly recorded in the office of the register of deeds of Mecosta county on the 2d day of April, 1894, and defendant Potter immediately took possession of the lands, and continued to hold and manage the same. Neither Gibbons, the receiver of the bank, nor the defendant Potter, had any knowledge, information, or notice of the agreement between Moore and the complainant, or of the existence of the mortgage, or of its deposit with Morgan. They knew the attachment had been released. Moore refused to join with Earle in directing Morgan to deliver the mortgage to Leonard, and refused to direct such delivery in any manner. Both Leonard and Earle have demanded it of Morgan, who has declined to deliver it because Moore has not joined in directing him to do so; and Morgan retained the envelope containing the mortgage, with the seal unbroken, until directed to open it while giving his testimony in this case."

It is claimed Mr. Moore, at the time the arrangement was made, represented he was solvent. The president and Mr. Earle, a director, say they believed the statement. The cashier says he doubted very much his statement that he was solvent. Subsequent events showed his liabilities were largely in excess of his assets. The only defendant in interest is the City National Bank of Greenville, then in the hands of Mr. Gibbons, a receiver. The bank and its receiver are not made parties to the proceeding. The bill is filed for the purpose (1) of compelling the defendant Morgan to deliver the mortgage to the complainant; (2) to declare such mortgage prior in point of right and time to the deed to the defendant Potter; (3) for general relief. The circuit judge dismissed the bill.

It is claimed the City National Bank and its receiver should have been made parties, and, as they were not, the bill should be dismissed. The deed to Mr. Potter was made for the benefit of the bank. He was made a party, and the defense claimed by the bank is entered upon fully by Mr. Potter. We think there is no difficulty in taking care in this proceeding of the rights of all the parties in interest, and the bill will not be dismissed for that reason.

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The contest is one between two banks, both of whom are creditors of Mr. Moore, both of whom were promised security by him. One of these creditors has obtained, through the deed to Mr. Potter, some of the promised security. The other creditor claims the transaction between it and Mr. Moore, in relation to the mortgage, resulted in giving it security, which should be treated as prior in time and right to the deed. The law is well settled in this State that a debtor may prefer one creditor to another, and may use any of his property for the purpose of paying or securing his debts, in such order as he may select, and nothing but a distinct lien upon property can prevail against such disposition. *People* v. *Bristol*, 35 Mich. 28; *Hill* v. *Bowman*, Id. 191; *Jordan* v. *White*, 38 Mich. 253; *Brigham* v. *Fawcett*, 42 Mich. 542; *State Bank of Fenton* v. *Whittle*, 48 Mich. 1; *Howard* v. *Rynearson*, 50 Mich. 307; *Sheldon* v. *Mann*, 85 Mich. 265; *Strauss* v. *Parshall*, 91 Mich. 475; *Ball* v. *Phenicie*, 94 Mich. 355.

Even if the mortgage which was left with Mr. Morgan was a present security, as contended by complainant, it was not put upon record so that other creditors had constructive notice of it. All the witnesses sworn who had any knowledge upon the subject testify that Mr. Potter, the trustee, and Mr. Gibbons, the receiver, had no notice of the giving of the mortgage when the deed to Mr. Potter was made and he entered into possession of the property. The mortgage was never delivered to the Belding Savings Bank, or to any one for it. Giving the most favorable construction possible to the language used by the parties, the mortgage was to be delivered when a contingency, which might or might not occur, had occurred. Whether the event had happened or not was left for Mr. Earle and Mr. Moore jointly to decide. It was agreed by both parties that their joint assent was essential before the mortgage should be delivered to the bank, and a like assent was required before it could be returned to Mr. Moore. This joint action was never had. One of the necessary essentials to the validity of a deed so as to pass

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title is delivery; not necessarily to the grantee, but it must be surrendered to the grantee or to some third person for the grantee. If the delivery to the third person is unconditional, it would be a good delivery when accepted by the grantee. The grantor must intend there should be a delivery of the deed, to make it effective. *Thatcher* v. *St. Andrew's Church*, 37 Mich. 264; *Stevens* v. *Castel*, 63 Mich. 111; *Schuffert* v. *Grote*, 88 Mich. 650 (26 Am. St. Rep. 316); *Chick* v. *Sisson*, 95 Mich. 412; *Burk* v. *Sproat*, 96 Mich. 404. The parties mutually agreed the assent of Mr. Moore should be obtained before the mortgage should be delivered.

The decree is affirmed, with costs.

The other Justices concurred.

JONES v. HOME SAVINGS BANK.

1. TRUSTS AND TRUSTEES—ACCOUNTING—RECEIPT FRAUDULENTLY OBTAINED.

Where the trustee of an infant's estate, upon the beneficiary's becoming of age, rendered him an account, and the latter, having no personal knowledge of the transactions, gave his receipt upon the basis fixed by such account, and subsequently, after the trustee's death, it was discovered, upon an examination of the books by an expert accountant, whose finding was given by stipulation the force of that of a referee, that, at the time the receipt was given, a large amount remained in the trustee's hands unaccounted for, the finding so far overcame the *prima facie* effect of the receipt as to leave no room for an inference inconsistent with liability.

2. SAME—LIMITATION OF ACTIONS.

The fact that money due a *cestui que trust* is allowed by him to remain in the hands of the trustee after the termination of an express trust does not change the nature of the debt, and hence, until an accounting is had or demanded, the statute of limitations does not begin to run.

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Error to Wayne; Hosmer, J. Submitted June 14, 1898. Decided September 20, 1898.

Henry K. Jones and Matilda C. Jones presented a claim against the estate of J. Huff Jones, deceased, for a balance due from decedent as trustee under the will of Catherine H. Jones. The claim was allowed by the commissioners, and the Home Savings Bank, a creditor, appealed to the circuit court. From a judgment for claimants on verdict directed by the court, contestant brings error. Affirmed.

George W. Radford, for appellant.

Sidney T. Miller, for appellees.

MONTGOMERY, J. The hearing below was on an appeal from an allowance of a claim in favor of the appellees by commissioners on claims. On the trial the circuit judge directed a verdict in favor of claimants. The Home Savings Bank, a creditor of the estate, defended against the claim in the circuit court, and has brought error to review the proceedings on the trial.

As the circuit judge directed a verdict, the question presented is whether the testimony was conclusive to sustain the claim presented, or whether, on the other hand, an inference of nonliability could be drawn from the whole testimony. The facts were not much in dispute. A history of the claim is, in brief, as follows: Catherine H. Jones, the grandmother of claimants, died testate, Octobor 18, 1865, bequeathing to J. Huff Jones and Augustus P. Thompson a considerable estate in trust for these claimants, to possess, control, and manage until the younger of the two claimants should attain the age of 21 years; and empowered the trustees to lease, sell, or mortgage any portion of the estate, and to invest the trust property in first-class securities, and to divide the property equally when the younger child should attain the age of 21 years. J. Huff Jones became the active trustee in the

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management of the estate. Henry K. Jones became of age October 30, 1883, and Matilda C. Jones on August 2, 1886. On August 11, 1886, the trustees deeded to Henry K. and Matilda C. Jones, jointly, all of the real estate held in trust, the active trustee, however, retaining control of the personal estate until March 10, 1888, when the personal property for which he accounted was turned over in equal parts, and a receipt in full given by each of the claimants, purporting to discharge the trustees from liability as trustees. J. Huff Jones died testate, but insolvent, December 16, 1892. Shortly after the death of J. Huff Jones, Henry K. Jones for the first time made an examination of the books of J. Huff Jones kept in connection with the books of another trust estate in the hands of J. Huff Jones, and found substantial inaccuracies in the accounts. This directed his attention to the accounts kept by deceased of the transactions relating to the property of these claimants, and on examination he found inaccuracies in the account. Further investigation by the claimant and experts resulted in the presentation of the present claim.

After the presentation of this claim, an expert accountant, Mr. John H. Clegg, was employed to examine the books of deceased, and the result of his examination was a finding that there was on the 10th of March, 1888, a balance due the claimants of $25,258.07 over and above the amount accounted for. A stipulation was entered into between the parties, reading as follows:

"It is hereby stipulated and agreed by and between the parties hereto that the examination of the books and accounts of said suit, made by John H. Clegg, at the trial of this cause on appeal, may be treated as though such examination had been made by a referee, under the direction of the court, for the purpose of ascertaining the amount due from J. Huff Jones to claimants, according to the books and papers of J. Huff Jones in the condition they were in at the time of his death, and the amount so found due may be considered the same as if found by a referee; provided, that this stipulation shall not be con-

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strued as in any way to prevent the raising of an issue of fact or law based upon any alterations, omissions, or errors which may be found in the original entries and accounts of said J. Huff Jones, deceased, as to any part or all of said account, or of any question concerning the same; or likewise to prevent the raising of an issue of fact or law based upon dealings between claimants and said deceased concerning said claim, or any part thereof.

[Signed] "SIDNEY T. MILLER,
"Att'y for Claimants.
[Signed] "GEORGE W. RADFORD,
"Att'y for Appellant."

In our view, this stipulation left very little to litigate. As regards the amount of the liability, if any existed, if the contestant had been able to show that this amount was incorrect because of omissions and errors or alterations, it was open to it to do so; but we do not think the testimony offered, when analyzed, impeaches the finding of Mr. Clegg. No special errors in the account are pointed out in the brief of appellant's counsel, while the testimony of witnesses for claimants shows very clearly that the changes were made in the books either by J. Huff Jones or his bookkeeper, and in his lifetime.

It is contended by appellant's counsel—

"That it was a question of fact for the jury to determine whether the investigations of Clegg were of sufficient weight and accuracy to show fraud, mistake, or misrepresentation on the part of J. Huff Jones, and thus overthrow the settlement of March 10, 1888, between claimants and J. Huff Jones, by which the former acknowledged payment in full, and released J. Huff Jones from all liability."

We do not agree with this contention. All the testimony in the case was to the effect that neither of the claimants had ever examined into the transactions of deceased as their trustee. There was no pretense that they had personal knowledge of the transactions. It cannot be gainsaid that the receipts on their face show that the trustee had assumed to account for all the avails of their property; and yet at the very date, as appears from the

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finding of Mr. Clegg (whose finding is of the force of that of a referee), there was in the hands of this trustee, unaccounted for, more than $25,000. We are all satisfied that the testimony on behalf of claimants not only overcame the evidence afforded by the receipts, but that it left no room for any inference inconsistent with liability.

The point is made that the claimants were barred by the statute of limitations before Mr. Jones' death. As essential to this contention, the counsel for appellant argues that, by the terms of the trust, the same terminated when Matilda C. Jones reached the age of 21 years. But the mere fact that money due the *cestui que trust* is allowed by him to remain in the hands of the trustee does not change the nature of the debt, and, until an accounting was had or demanded, the statute of limitations did not run. 2 Perry, Trusts, § 863 (p. 513, 4th Ed.), and cases cited; *Frank* v. *Morley's Estate*, 106 Mich. 635.

Judgment affirmed.

The other Justices concurred.

MORAN v. L'ETOURNEAU.

1. EQUITY—RES JUDICATA.

A decree dismissing, after a hearing on the merits, a bill to set aside for fraud a written agreement as to the compensation to be allowed by complainant to defendant as her attorney, is conclusive of the validity of the agreement, when attacked upon the same ground in a subsequent proceeding.

2. ATTORNEY AND CLIENT—AGREEMENT FOR COMPENSATION.

An attorney's undertaking to "secure" for his client her rights in a decedent's estate, in consideration of a stipulated interest in the property so secured, is fulfilled, so as to entitle him to the agreed compensation, where he performs all ser-

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vices necessary to the establishment of his client's rights, although the estate acquired vests in the client by operation of law.

Appeal from Wayne; Hosmer, J. Submitted June 14, 1898. Decided September 20, 1898.

Bill by Charles G. Moran against Annie L'Etourneau to enforce an equitable interest in real estate. From a decree dismissing the bill, complainant appeals. Reversed.

Barbour & Rexford (*W. F. & W. D. Atkinson*, of counsel), for complainant.

Jasper C. Gates, for defendant.

MONTGOMERY, J. This suit involves the title of 5-81 of lots 21 and 22 of block 5 of the Cass farm, in the city of Detroit. August 26, 1860, Francis L'Etourneau died testate. These lots were part of his estate. In 1891 his will was construed by this court, and it was settled that the estate of Sarah L'Etourneau was entitled to 5-9 of the property. *L'Etourneau* v. *Henquenet*, 89 Mich. 428 (28 Am. St. Rep. 310). The daughter of defendant, Margaret L'Etourneau, claimed to be entitled to 3-54 of the estate as heir to her father. The decree of the circuit court recognized this right, but by the terms of the decree in this court she was excluded from so taking. James J. Atkinson appears to have represented the interests of Margaret under an employment by defendant. At first the terms were oral and somewhat indefinite, but afterwards, on July 30, 1891, they were reduced to writing. The agreement reads as follows:

"This agreement, made and entered into between Mrs. Annie L'Etourneau, of the first part, and James J. Atkinson, of the second part, witnesseth: Said party of the second part has for some time past been engaged in securing for said party of the first part, as her attorney, her rights and interests in the estate, both real and personal,

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of Francis L'Etourneau, Clothilde L'Etourneau, Eleanor L'Etourneau, Timothy L'Etourneau, Sarah L'Etourneau, and Emily Hennaguennet, deceased, all formerly residents of Michigan, and all relatives by marriage of said party of the first part; said property being all her interest in any and all property coming to her daughter from the estate of Francis L'Etourneau directly or by inheritance from his heirs, a more particular description of which is to be found in deeds to the said party of the first part from her said daughter (Margaret L'Etourneau), acknowledged in Paris, France, on June 9, 1889, and September 23, 1890. He is to continue and secure for said party of the first part all he can out of each of said estates and property, and with all possible speed, and is to pay all counsel fees and all expenses connected therewith. In consideration of the same, the said party of the first part agrees that of said property, real or personal, so secured, the said party of the second part shall receive, as his compensation, a one-third, the balance, two-thirds, to be the property of the said party of the first part, and to be delivered to her at the close of said proceedings."

In addition to the appearance in *L'Etourneau* v. *Henquenet*, Mr. Atkinson or his associates appeared in probate court, and attended at the time of the appointment of an administrator upon the estate of Sarah L'Etourneau. No other substantial service was rendered. The defendant, as appears recited in the agreement above set out, and as also appears by other testimony, acquired by deed the interest of Margaret. The present complainant claims under a deed from James J. Atkinson of a 5-81 part.

Before the conveyance to complainant, the defendant filed a bill of complaint against Atkinson in the circuit court for the county of Wayne, in chancery, alleging that the instrument above recited was obtained by fraud, and praying, among other things, that it be declared void. The case was heard before Judge Carpenter, and a decree entered dismissing the bill. It also appears from the opinion of Judge Carpenter that there was no misrepresentation by Atkinson as to the nature of the service required to establish her right to the estate. This decree

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must be treated as conclusive of the validity of the agreement. *Detroit, etc., R. Co.* v. *McCammon*, 108 Mich. 368. The only question open on this record is whether Atkinson rendered the services entitling him to claim the interest in this estate covered by the agreement. It is earnestly insisted that the estate of Margaret vested in her by operation of law, and it was not "secured" for her or the defendant by Atkinson. We think this construction of the word "secure" too technical. The services which Atkinson had already performed were recited, and their nature cannot have been misunderstood. Such services as were necessary to the establishment of the rights of the defendant, Atkinson rendered or stood ready to render.

The complainant is entitled to the relief prayed. The decree will be reversed, and decree entered for complainant, with costs of both courts.

The other Justices concurred.

ALDINE MANUFACTURING CO. *v.* PHILLIPS.

1. LIENS—INCIDENTS.
   A lien implies, primarily, simply a right of detention of property until the claim of the person entitled to the lien is satisfied; such person having, in the absence of statute or special agreement, no right to sell the property detained.

2. SAME—FORECLOSURE IN EQUITY—JURISDICTION.
   While equity, having acquired jurisdiction for other purposes, may order sales of property for the satisfaction of liens as an incident to the general relief, it has no jurisdiction to enforce a lien, whether common law or statutory, upon a bill filed solely for that purpose.

3. SAME — CORPORATIONS — STOCK AND STOCKHOLDERS — PLEADING.
   The fact that an accounting is asked in a bill filed by a corporation to foreclose a lien upon stock under 3 How. Stat. §

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4161*b*5, for a debt of the holder, is insufficient to confer such jurisdiction, where there is nothing to show that the claim is not one which a court of law can deal with as an open account.

4. EQUITY PLEADING—DEMURRER—AMENDABLE DEFECTS.
The right of complainant to correct amendable defects in his bill, upon a demurrer thereto being sustained, is dependent upon his advising the court that he desires to make such amendments.

Appeal from Kent; Grove, J. Submitted June 15, 1898. Decided September 20, 1898.

Bill by the Aldine Manufacturing Company against James T. Phillips to foreclose a lien upon stock. From a decree dismissing the bill on demurrer, complainant appeals. Affirmed.

Butterfield & Keeney, for complainant.

More & Wilson, for defendant.

HOOKER, J. The defendant being a stockholder in the Aldine Manufacturing Company, that company filed the bill in this cause, claiming an indebtedness due to it from the defendant, upon open account, for $1,000 and upwards, and praying an accounting, and a decree of foreclosure of its lien upon his stock in default of payment. The lien is claimed to exist by virtue of section 4161*b*5, 3 How. Stat., which provides that the corporation shall at all times have a lien upon all the stock or property of its members invested therein, for all debts due from them to such corporation. The bill was demurred to on two grounds: (1) That there was no jurisdiction in equity to enforce the lien; (2) that the remedy provided by 3 How. Stat. §§ 4161*c*3–4161*c*7, inclusive, is exclusive. The demurrer was sustained, and the bill dismissed. The complainant has appealed.

Upon the part of the defendant it is claimed, *first*, that equity has no jurisdiction to enforce a sale of the prop-

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erty to satisfy the statutory lien in a proceeding brought solely for that purpose; and, *second*, that, even if the court might do so when it had acquired jurisdiction for some other purpose within its jurisdiction, no such situation exists here. The theory upon which the bill seems to have been filed is that the lien of the complainant was akin to that of a mortgage or pledge of the stock, and carried with it a right to enforce payment of the debt secured by it, through foreclosure in a court of chancery, as well as by the notice and sale provided for by the statute to which allusion has been made.

This lien is not one which is created by direct agreement of the parties, such as a pledge or a mortgage, but arises by operation of law out of certain business relations, viz., that of corporation and stockholder. It is not in its nature an equitable lien, like the lien of a vendor of land sold upon contract for the purchase price. In such cases, under our practice, courts of equity have power to enforce the lien, upon bill practically for specific performance, to which the enforcement of the decree for the purchase price, by sale of the premises, is an incident. See *Fitzhugh* v. *Maxwell*, 34 Mich. 140, and *Boehm* v. *Wood*, Turn. & R. 332. It is, on the contrary, a legal security, closely analogous to a common-law lien, which last is said not to be enforceable in equity. Indeed, in cases of common-law liens, which always involved possession of the chattel, actual or constructive (2 Kent, Comm. 639), the creditor had no right to sell the chattel for the purpose of obtaining compensation. The lien was defined to be "the right of detention, in persons who have bestowed labor upon an article, or done some act in reference to it, and who have the right of detention till reimbursed for their expenditures and labor." *Oakes* v. *Moore*, 24 Me. 219 (41 Am. Dec. 379). As said by Chancellor Kent: "A lien is, in many cases, like a distress at common law, and gives the party detaining the chattel the right to hold it as a pledge or security for the debt, but not to sell it. It was said by Popham, C. J., in the *Hostler Case*,

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Yel. 66, that an innkeeper might have the horse of his guest appraised and sold after he had eaten as much as he was worth. But this was a mere extrajudicial *dictum*, and it was contrary to the law, as it has been previously and subsequently adjudged." 2 Kent, Comm. 642, and cases cited. See, also, 1 Jones, Liens, § 335, where the author, in discussing a carrier's lien, says that it, "like all other common-law liens founded upon possession, gives him [the holder] no right to sell the property, but only a right to retain it until his charges are paid." Again, in section 1033 the learned author says that "a common-law lien * * * is merely the right of a person in possession of the property of another to detain it until certain demands * * * are satisfied."

In *Doane* v. *Russell*, 3 Gray, 382, a wagon maker sold a wagon, pursuant to notice to the owner, for the purpose of satisfying his lien, and the court held that he had no right to do so. In *Briggs* v. *Railroad Co.*, 6 Allen, 246 (83 Am. Dec. 626), a railroad company sold flour to pay their charges for its transportation, and it was held that they had "only a right to detain it until they were paid; not to sell it to obtain the remuneration to which they were entitled." In *Pothonier* v. *Dawson*, Holt, N. P. 383, Chief Justice Gibbs said: "Undoubtedly, as a general proposition, a right of lien gives no right to sell the goods." This was *obiter*, but nevertheless, from the eminence of the author, it is entitled to great weight. The doctrine was stated in *Jones* v. *Pearle*, 1 Strange, 556. Again, in *Lickbarrow* v. *Mason*, 6 East, 27, note, the rule was stated by Mr. Justice Buller as follows: "But he who has a lien only on goods has no right so to do [*i. e.*, sell and dispose of them]; he can only retain them till the original price be paid." See, also, *Walter* v. *Smith*, 5 Barn. & Ald. 439, cited in *Doane* v. *Russell*, *supra*, to the point that "a pledge as security for a debt * * * is a lien with a power of sale superadded." Chief Justice Shaw also cites *Cortelyou* v. *Lansing*, 2 Caines, Cas. 200; 1 Chit. Prac. 492; Cross,

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Lien, 47; Woolrych, Com. & Merc. Law, 237. In *Briggs* v. *Railroad Co.*, *supra*, Merrick, J., said: "And the rule, which is now well established, that a party having a lien only, without a power of sale superadded by special agreement, cannot lawfully sell the chattel for his reimbursement, is as applicable to carriers as it is to all others having the like claim upon property in their possession." While the doctrine of these cases—*i. e.*, that the creditor cannot sell the property—is indisputable, there was no impediment to the recovery of judgment and sale of the property, as well as any other property of the debtor, on execution. *Tete* v. *Bank*, 4 Brewst. 308; *Buffalo, etc., R. Co.* v. *Dudley*, 14 N. Y. 336.

Does it follow that a common-law lien can be foreclosed in equity because it does not confer upon the creditor the right to sell the property? It is evident that, in cases of common-law lien for a liquidated claim, a judgment and execution are as expeditious and effective as a proceeding in equity would be likely to be, and an application of the familiar doctrine that equity will not intervene when there is an adequate remedy at law would seem proper. It is a significant fact that we are not cited to any well-settled line of authorities that supports the practice of foreclosing common-law liens in equity. At the same time, Chancellor Kent, in discussing the subject, says: "I presume that satisfaction of a lien may be enforced by a bill in chancery." 2 Kent, Comm. 642. He supports the statement by no authorities, however. And in *Tete* v. *Bank*, *supra*, there is a *dictum* that in proper cases the creditor may invoke the aid of a court of equity to work out a sale. The lien with which we have to do is not a common-law lien, but is statutory. It has the attributes of a common-law lien, however, although the manual possession of the certificates of stock is not with the complainant. Inasmuch as a transfer of the stock must be upon the books, it may be urged that the corporation has constructive possession. But it is not of much importance whether it has possession or not.

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Statutory liens often exist although the creditor has not possession of the property; and we know of no authority that treats the matter of possession as depriving statutory liens of the legal attributes of common-law liens, to which they are analogous. 1 Jones, Liens, § 104, says that "a statutory lien without possession may, by force of the statute, have the same operation and efficacy that a common-law lien has with possession." See Id. § 112; *Beall* v. *White*, 94 U. S. 382.

In the case of *Southern Mich., etc., Lumber Co.* v. *McDonald*, 57 Mich. 292, COOLEY, C. J., said that "log labor liens, [which are statutory] could give no jurisdiction to a court of equity. If valid, they were legal claims." In *Thames Iron-Works Co.* v. *Patent Derrick Co.*, 1 Johns. & H. 93, 97, the jurisdiction of equity to enforce by sale a builder's lien upon a vessel was denied; and in answer to the claim of exigency, alleged to arise from the expense of retaining the chattel, and the consequent necessity to make the security effectual by annexing to the passive lien the active right of sale, Mr. Vice Chancellor Wood said that "if, in a matter of this magnitude, the court should for the first time in 1860 establish such a new right as between persons dealing with chattels, it would injure rather than promote commercial interests." See *Canal Co.* v. *Gordon*, 6 Wall. 561, where the Federal Supreme Court held that the jurisdiction to enforce a statutory lien "rests upon the statute, and can extend no further."

In 23 Am. & Eng. Enc. Law, 697, it is said: "The lien is most frequently enforced by the refusal of the corporation to register transfers from an indebted member;" citing many cases. It adds that other methods of enforcement are foreclosure and sale and attachment. Few authorities are cited, and these will be discussed later. 1 Cook, Stock, Stockh. & Corp. Law, § 530, cites the same. But, when we search for cases where statutory or common-law liens have been foreclosed in equity upon bills filed for the purpose, we find few, though it is probable that the

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States of Alabama, Kentucky, Illinois, and Maryland would sustain the practice. In *Westmoreland* v. *Foster*, 60 Ala. 448, a bill was filed against a tenant to enforce a lien for rent, against cotton in the hands of a vendee of the tenant. It was there held that a statutory lien, which is an incident of some contract made, is enforceable by the common processes of the law. This case proceeded upon the theory of a trust. *Tutwiler* v. *Land Co.*, 89 Ala. 391, was a case where the stockholder filed a bill to enjoin a sale of his stock on account of a failure to pay calls, and to have the affairs of the corporation settled, and an account stated. A demurrer was sustained, and the complainant appealed. The case was affirmed, and the court seems to have held that the lien on the stock could have been foreclosed in chancery, citing the *Westmoreland Case* as authority. This case was followed by *Crass* v. *Railroad Co.*, 96 Ala. 447. A bill was filed to enforce a common carrier's lien, and to require the defendants to interplead as to the ownership of the property which was in the carrier's possession. The court said that it had no doubt that a court of chancery had jurisdiction to enforce the lien, again citing the *Westmoreland Case* and the authority quoted from Kent. It is fair to say that, while each of these cases alleges some other ground of jurisdiction than the mere foreclosure of a lien, the latter case indicates that a bill filed for foreclosure only would be sustained.

In *Kenton Ins. Co.* v. *Bowman*, 84 Ky. 430, a suit was brought to foreclose a mortgage on the property of the wife of Shinkle to the complainant. Shinkle held stock in the complainant company, and by an amended petition the complainant claimed a lien on that stock to secure this mortgage debt, or any part which should remain unsatisfied by the foreclosure of the mortgage. A decree of foreclosure was granted. In *Brent* v. *Bank*, 10 Pet. 596, executors of a deceased stockholder filed a bill to compel a transfer of stock for the benefit of the United States, it having been assigned by the testator as security for a debt

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due to the government. Counsel stipulated that, in case it was found that the bank had a lien upon the stock, the court might decree that the stock should be sold to satisfy it, which it did. In *Bank of Kentucky* v. *Bonnie*, (Ky.) 43 S. W. 407, an action was brought to enforce a lien upon collaterals held in pledge by a bank, and also to enforce a statutory lien upon the stock of the debtor. It does not appear that the right to decree sale was questioned. In *National Bank* v. *Tumbler Co.*, 172 Pa. St. 614, a bill was filed to compel a transfer of stock to a pledgee. The Tumbler Company filed a cross-bill to enforce its lien, which was sustained, and the stock was sold to satisfy it. In the case of *Farmers' Bank of Maryland*, 2 Bland, Ch. 394, an administrator filed a bill to compel the bank to apply stock dividends upon indebtedness due the bank from the intestate, and to sell the stock and apply the proceeds, and that only the deficiency after such application of dividends and sale of stock should be admitted as a claim against the estate.

It will be seen from the foregoing that, in nearly all of these cases, jurisdiction might have been sustained upon other grounds than that of foreclosure, and that the court might therefore, in order to do justice between the parties, have allowed a sale of the stock. Such was the case in *Kenton Ins. Co.* v. *Bowman*, 84 Ky. 430. The later case of *German Nat. Bank* v. *Trust Co.*, (Ky.) 40 S. W. 458, was a simple foreclosure bill, and sustains the practice on thea uthority of *Kenton Ins. Co.* v. *Bowman*. We have already seen that a similar course of decision is found in Alabama, the doctrine being based upon cases which were distinguishable. In Maryland the earlier case was not a foreclosure bill, but was a bill filed against the bank to compel an accounting and transfer of stock, on which the bank claimed a lien. In the opinion the lien was treated as a mortgage, and it is intimated that it might be foreclosed. Ultimately, the stock was sold. The subsequent case of *Reese* v. *Bank of Commerce*, 14 Md. 271, permitted a foreclosure of a lien on stock. In *Brent* v. *Bank*,

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10 Pet. 596, the decree may be ascribed to stipulation, notwithstanding the fact that the bill was filed to compel a transfer. In *Bank of Kentucky* v. *Bonnie* the bill was filed to foreclose a statutory lien in conjunction with a mortgage on other property. In *National Bank* v. *Tumbler Co.*, a bill was filed to compel a transfer; while in *Re Morrison*, 10 N. B. R. 105, the sale was under bankruptcy jurisdiction. In the case of *Cairo, etc., R. Co.* v. *Fackney*, 78 Ill. 116, in an action of *assumpsit*, broad language was used as to the jurisdiction of equity in the enforcement of statutory liens, but it must be remembered that the lien involved there was a lien against a railroad.

We have yet to notice our own case of *Citizens' State Bank of Monroeville* v. *Kalamazoo County Bank*, 111 Mich. 313, where stock was sold and proceeds applied upon a lien. This question was not discussed, and the decree was made upon a cross-bill, where the original bill was filed to compel a transfer of stock. The court had jurisdiction for another purpose, and, having jurisdiction for one purpose, was justified in doing complete justice between the parties.

It is manifest that there is confusion in the law upon this subject. If it is true that equity has jurisdiction to enforce payment by foreclosure in all cases of statutory liens, it must be because of a difference between them and common-law liens, which we have not been able to discover, or because of the force to be accorded to authorities comparatively modern, few of which are cases of foreclosure merely. If that is the rule, it will be hard to distinguish the present case from any other lien for labor, carriage, or storage. The log lien, which has been discussed, would be no exception; for, if chancery has a general jurisdiction to enforce liens, it is not lost by the addition of a statutory method of relief. Authorities are numerous in support of this proposition. So that, to our mind, the authorities, if there are such, that hold the statutory remedies are exclusive, recognize the want of

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jurisdiction in equity. We are of the opinion that resort to equity is neither necessary nor permissible in the majority of lien cases, and that the courts of law can deal with them cheaply and expeditiously. On the other hand, we have no doubt that equity, having jurisdiction for other purposes, may order sales of property for the satisfaction of liens, as was done in our own case already cited.

It is contended that such jurisdiction is shown by the bill in this case, but we think not. It seems to be a foreclosure bill simply. It is urged that an accounting is necessary; but we think the bill does not show that complainant's claim is not one that a court of law can deal with as well as any other case of open account. We see no opportunity for a multiplicity of suits, and the bill does not show that for any reason the remedy by judgment and execution is not adequate.

Counsel urge that they should have been given an opportunity to amend, and the bill should not have been dismissed peremptorily. Under the case of *Lamb* v. *Jeffrey*, 41 Mich. 719, the complainant should have been given an opportunity to amend its bill, if it desired it. We cannot assume that it did, and the record does not show that it asked it, so far as we are advised.

We must affirm the decree, with costs.

GRANT, C. J., MOORE and LONG, JJ., concurred. MONTGOMERY, J., did not sit.

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TEMPLE *v.* GOLDSMITH.

1. STATUTE OF FRAUDS—ORIGINAL PROMISE—QUESTION FOR JURY. Plaintiff furnished lumber for an improvement made by F. to defendant's house. Plaintiff testified that he said to defendant, "If I furnish the lumber for you, I am not going to charge it up to F., I will charge it to you;" that such was the understanding; that defendant said he wanted F. to furnish the lumber himself, so he could get his pay out of F., who owed him; that plaintiff said, "I cannot furnish the lumber for F. to pay his old bills;" and that defendant replied, "I think there will be enough in the job to pay me, and you for your lumber too." Another witness gave testimony from which it could be inferred that the credit was given to defendant, and was so understood by him. *Held*, sufficient to justify the submission to the jury of the question of an original promise by defendant.

2. SAME—EVIDENCE—BOOKS OF ACCOUNT—HARMLESS ERROR. Error, if any, in permitting plaintiff in such case to introduce in evidence his books of account, showing that the lumber was charged to defendant, was cured by an instruction that the fact that the charge was made to defendant was important only in case the jury should find that it was so charged by the authority or with the assent of defendant.

Error to Wayne; Grove, J., presiding. Submitted June 10, 1898. Decided September 20, 1898.

Assumpsit by Albert E. Temple against Earl Goldsmith for goods sold and delivered. From a judgment for plaintiff, defendant brings error. Affirmed.

James H. Pound, for appellant.

Cutcheon, Stellwagen & Fleming, for appellee.

GRANT, C. J. This is a suit for $34, brought to recover for a bill of lumber alleged to have been sold by plaintiff to defendant. Defendant, desiring an improvement upon his house, solicited one Fisher, a carpenter, to bid. Fisher obtained the plaintiff's assistance in estimat-

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ing the cost, and $55 was the sum fixed as a safe bid. Defendant afterwards saw plaintiff, and asked him if Fisher had been there to get lumber. After detailing the conversation with Fisher, plaintiff testified: "I said [to defendant]: 'Earl, if I furnish the lumber for you, I am not going to charge it up to Fisher; I will charge it to you.' That was the understanding." Defendant said he "wanted Fisher to furnish the lumber himself, so he could get his pay out of Fisher; that he owed him; and I said, 'I cannot furnish the lumber for Fisher to pay his old bills;' and he said, 'I think there will be enough in the job to pay me, and you for your lumber too.'" One other witness gave testimony from which it may be inferred that the credit was given by plaintiff to defendant, and that defendant so understood it.

1. It is urged that there was no evidence of an agreement or original promise on the part of defendant. We think that the evidence was sufficient to justify the submission of the question to the jury. It was debatable whether plaintiff trusted Fisher or defendant, and whether it was agreed that the credit should be given to defendant. The question was not so clear as to justify the court in disposing of the question.

2. Plaintiff was permitted to introduce in evidence his book of accounts, which he himself kept, showing the amount of lumber, and that it was charged to defendant. This is alleged as error, under *Hodges* v. *Power Co.*, 109 Mich. 547. If this was error, it was cured by the instruction of the court that the fact that the charge was made to the defendant was only important in case they should find it was so charged by the authority or with the assent of the defendant. Taking this in connection with the instruction that the sole question in the case was whether the agreement was "that the lumber should be charged to defendant, and that the defendant obligated himself to pay for it," we think there was no error.

Judgment affirmed.

The other Justices concurred.

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LONG v. LANDMAN.

1. ESTATES OF DECEDENTS—MORTGAGE BY EXECUTOR—PROBATE COURTS—JURISDICTION—COLLATERAL ATTACK.
   The necessity for an executor's giving a mortgage upon decedent's property to pay a debt against the estate is not open to inquiry upon a bill to foreclose the mortgage, where the execution of the same was authorized by the probate court upon a petition containing allegations sufficient to confer jurisdiction upon it.

2. SAME—DEBT ACCRUING AFTER DECEDENT'S DEATH.
   Under 3 How. Stat. § 6105, providing that the probate court may authorize the giving of a mortgage for the "purpose of paying the debts against the estate of any deceased person," such court may authorize a mortgage for the payment of debts and charges accruing after decedent's death.

3. SAME—TAXES—DUTY OF EXECUTOR.
   It is the duty of an executor to pay the taxes upon real estate of the decedent in his possession pending the settlement of the estate; and, where the available funds of the estate are insufficient for the purpose, he may obtain from the probate court the authority to raise the amount by mortgage upon the land.

4. SAME—FORECLOSURE OF MORTGAGE—OBJECTIONS.
   An objection that the amount for which a mortgage was given by an executor, under authority of the probate court, for the payment of debts against the estate, includes improper items, does not go to the validity of the mortgage, and hence will not be considered on foreclosure, but will be left for adjustment in the probate court upon the executor's accounting for the moneys received on the mortgage.

Appeal from Kent; Adsit, J. Submitted June 7, 1898. Decided September 20, 1898.

Bill by Kate E. Long against William J. Landman, administrator with the will annexed of the estate of Mary C. Hurlbut, deceased, George H. Long, executor of the last will and testament of Arthur B. Long, deceased, and

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others, to foreclose two real-estate mortgages. From a decree for complainant, defendants, except George H. Long, appeal. Affirmed.

Crane, Norris & Stevens, for complainant.

Butterfield & Keeney, for appellants.

MOORE, J. This is a proceeding to foreclose two mortgages. A decree was rendered in the court below in favor of complainant, from which decree some of the defendants appeal.

Prior to 1878, Arthur B. Long, of the State of Pennsylvania, and his son, George H. Long, had been engaged in the business of lumbering. In April, 1878, a partnership agreement was made, which, omitting the formal part, reads as follows:

"As this agreement has reference now to the late firm of A. B. Long & Son, who has formerly been doing business as the firm of A. B. Long & Son, and is now carrying on and doing business of lumbering in the name of A. B. Long & Son at this date, and for some time has been doing and carrying on the business in this name, and that all lands and lumber, logs and other property, have been made to George H. Long and A. B. Long, for which property in logs, lands, and lumber, and sundry personal property has been made, by deed and otherwise, unto the late firm of A. B. Long & Son, A. B. Long and George H. Long, who in their own right and by deed own the property so sold and deeds held for the same as follows: That A. B. Long owns in said property and lands the undivided two-thirds of all lands and other property now held and owned by the firm of A. B. Long & Son, and that George H. Long now holds and owns the undivided one-third interest in all the above lands and other property; and now, for the purpose of continuing and carrying on the business of lumbering, we this day agree to continue the business in all its various branches and places as they shall from time to time think most proper and best for them to do, and the length of time shall be determined by the parties themselves, and to their best interest; and it is further agreed by and between the parties that A. B. Long shall not draw or take from the firm more than $500

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monthly, and that George H. Long shall not draw or take from the firm more than $250 monthly, and that A. B. Long is to have two-thirds interest and profits made by carrying on the said lumbering business, and bear the two-thirds losses, and George H. Long to have the one-third interest and profits made by carrying on the lumbering business, and bear the one-third losses."

Arthur B. Long died in 1884, leaving a will, which was duly probated in Pennsylvania, and afterwards in this State. The property was given by the will, one-fifth of it to each of four children, and one-fifth to one child and his children, after providing the sum of $3,000 annually to his wife. The sum of $10,000 was to be held by George H. Long as trustee, and the income from it was to be paid annually to William J. Long as long as he lived. By a codicil, George H. Long and David W. Woods were made executors. The will contained these provisions:

"All of my estate, both real and personal, that is being and lying in the county of Clearfield and State of Pennsylvania, and now leased unto Robert Hasse Powell, the same bearing date the 11th day of June, 1872, and June the third, 1871, and that my executors or their executors or administrators shall continue the said lease with the said Robert Hasse Powell for the full term of ten (10) years after my decease, and the royalties that accrue from said coal or lease shall by my executors be paid to the above legatees, as prescribed in section second, at the end of each year after my decease.

"The lease made on the ninth day of July, 1881, by and between George H. Long and A. B. Long, for certain pine timber being and lying in Mecosta county and State of Michigan, and that my executors or their executors or administrators, and with the sawmill at Grand Rapids, with the adjoining lands to said mill for sidings and ground for sticking and drying lumber, shall continue and remain as they now are, for such use and purpose, until all the pine timber on the above-named lands shall be manufactured at said mill, and sold, and the moneys thereof made shall from such lumber shall by my executors or their executors or administrators shall at the end of each year divide among the above legatees, as specified in the above in section second, after my decease. Any other lands being or lying in

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the State of Michigan, not mentioned above, shall be sold by my executors as soon as convenient after my decease. * * *

"I do by these presents give unto my executors, or a majority of them, or their executors or administrators, or a majority of them, full power and authority to grant, alien, bargain, sell, and convey by deed, and assign, all the said lands mentioned in this my last will, and any other lands or personal property I may have at the time of my decease, unto person or persons and theirs forever, in fee simple, by all and every such lawful ways and means in the law as to my said executors or their executors or administrators, or a majority of them, his or their counsel learned in the law, shall seem fit or necessary to be done."

Mr. Woods and Mr. Long qualified as executors; Mr. Woods having charge of affairs in Pennsylvania, and Mr. Long in this State. The business of lumbering was continued after the death of A. B. Long as it had been before, and the proceeds of the Michigan business were taken to Pennsylvania by Mr. Long, annually reported to the probate court, and distributed; the amount so taken by Mr. Long, and distributed, amounting to upwards of $500,000. Mr. Long also filed annual accounts in the Kent county probate court. The coal lands in Pennsylvania ceased to be productive in 1892 or thereabouts. The lumber was all manufactured in 1891 or 1892, and the mill in Grand Rapids was soon after that dismantled.

It is the claim of the executor that he had distributed the funds which came into his hands, amounting to upwards of a half a million of dollars, so that January 1, 1892, he had in his hands as executor but $134. In February of that year, he received upon a judgment a little over $600, which, he says, he had agreed to forward to the Pennsylvania executor, to help him pay the taxes on the coal lands. It is his claim that in October he was notified of an assessment against the Grand Rapids property of $2,400 for street improvements, and that there would be other taxes due, and that he had no money as executor with which to pay them. In January, 1895, he petitioned

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the probate court for leave to mortgage the real estate, to enable him to pay the debts against the estate. The petition contained, among other things, the following statements:

"That the amount of personal estate of the said Arthur B. Long that has come into the hands of your petitioner is the sum of $386,385, of which only one or two hundred dollars remains undisposed of; that the debts outstanding against the estate of the deceased, as far as can be ascertained, amount to the sum of $2,000 or thereabouts; that the charges of administering the estate of the deceased, including future probable charges, amount to the sum of $800; that the expense of administration of the estate of the deceased will amount to the sum of $800.

"That the following is a description of all the real estate of which the testator died seised in the county of Kent, in the State of Michigan, namely: [Then follows a description of the lands and of their values.] That there is not sufficient personal estate in the hands of the executor, your petitioner, to pay the debts outstanding against the estate of the deceased, and the expense of administration; that it is necessary to borrow money by way of mortgage on the whole of the real estate of said testator above described, for the purpose of paying the debts against the estate of the deceased and the expense of administration; that the names and residences of all persons interested in said estate are as follows: * * * that it will be necessary, for the purpose of paying the aforesaid debts, expenses, and charges, to borrow the sum of $3,600 by way of mortgage upon such real estate.

"Your petitioner therefore prays that he may be authorized, empowered, and licensed to borrow said sum of money by way of mortgage upon such real estate, or some part thereof, as the court shall deem best, for the purpose of paying such debts, charges, and expenses, according to the provisions of the statute in such case made and provided."

Due notice was given of the hearing, and the court made an order authorizing the executor to borrow $2,666.66 for one year, at 6 per cent., and to give a mortgage upon the undivided two-thirds interest of the testator in the lands described in the petition. The executor gave, upon

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the requirement of the court, a bond in the sum of $4,000, and took the oath required by statute. He arranged with the complainant, who is his wife, to borrow the money of her. He reported fully the arrangement to the probate court, and his action was approved and confirmed. No appeal was taken from any of these orders. On the same day the $2,666.66 mortgage was given, Mr. Long, as an individual, and as surviving partner of A. B. Long & Son, and as executor, and his wife, Kate E. Long, gave a mortgage on the undivided one-third interest which George H. Long owned in the same property, for $1,333.34, to Mr. Sheller, who is the brother of Mrs. Long; and the same day that mortgage was assigned to Mrs. Long, who paid over to Mr. George H. Long the sum of $4,000. It is to foreclose these mortgages that this suit is brought.

It is the claim of defendants there was no need of giving these mortgages, and that in the giving of them it was the purpose of the executor to acquire title to the property for much less than it is worth, and to deprive the other heirs of their interest in it. The defendants seek to attack in this proceeding the validity of the order made by the judge of probate, and have introduced the proceedings in the probate court, including the annual accounts which were filed prior to the making of the order. They also urge that Mrs. Long is not a good-faith holder of the mortgage. It is the contention of the complainant that she advanced the money upon the mortgages in the utmost good faith. She urges that the petition conferred upon the probate court jurisdiction authorizing the making of the mortgage, and its validity cannot be attacked in this proceeding.

The petition in this case complies with the provisions of the statute quite as fully as did the petition in the case of *Griffin* v. *Johnson*, 37 Mich. 87, in which case Justice CAMPBELL used this language:

"The allegations in this petition set up a sufficient state of facts, if true, to authorize the granting of a license. This being so, the truth or falsity of those allegations

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cannot be inquired into collaterally. The court having jurisdiction, parties claiming under a mortgage made in pursuance of a license are not required to investigate the truth of those facts, but have a right to assume the court acted correctly. This doctrine has been settled by a long series of decisions of this court,"—citing many cases.

This doctrine has since then been followed in a large number of cases. *Norman* v. *Olney*, 64 Mich. 553; *Egan* v. *Grece*, 79 Mich. 629; *Pfirrman* v. *Wattles*, 86 Mich. 254.

It is said, notwithstanding the general rule that an order of this kind by the probate judge cannot be attacked collaterally, this order can be, for the reason it was made without the court having any jurisdiction to make it. It is the claim of counsel that the probate court was without authority to make the order, for the reason that the debt accrued after the death of Mr. Arthur B. Long, and such an order could not be made for a debt arising after his death; citing a number of cases, but relying especially upon the case of *Farrar* v. *Dean*, 24 Mo. 16. The Missouri statute differs from ours. It reads: "Where there are not sufficient personal estate and effects charged with the payment of the debts of any testator or intestate, it shall be the duty of the executor or administrator to apply," etc., and provides an order may be made for a sale of so much real estate as shall be necessary for the payment of the debts of the deceased. 1 Rev. Laws 1825, p. 106, § 40. Our statute provides the probate court may authorize the giving of a mortgage for the "purpose of paying the debts against the estate of any deceased person." 3 How. Stat. § 6105. This statute was construed in *Re Lambie's Estate*, 94 Mich. 489, where it was held a mortgage against land owned by the deceased, but not made by him, was such a debt as authorized the order, the court saying:

"There is no question here but that this estate, consisting only of this one parcel of land which has been pledged to pay this specific sum, is legally liable to pay this charge

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upon it; and it can make no difference that deceased was not personally liable, but took this property subject to the pledge. * * * In the present case the language of the statute is 'debts against the estate.' Is not this mortgage debt one against the estate,—against the property of the estate? Is not the estate—the property of the estate—charged with its payment? Is it not legally liable for its payment? The word 'debts,' in the statute, should be given its ordinary signification, rather than a technical construction, which would be contrary to the practical construction which has been given it up to the present time."

A large proportion of the amount authorized to be raised was for assessments and taxes against the lands of the testator. Is not the estate—the property of the estate—chargeable with the payment of these taxes? And, if they were not paid, would not the land be sold? It was the duty of somebody to pay the tax. But it is said so much time has elapsed since the death of Mr. Long that this real estate ought not to have been under the control of the executor, but should have been partitioned. It is sufficient to say the statute gives the executor possession of the real estate until the estate is settled, or until delivered over by the order of the probate court to the heirs. 2 How. Stat. § 5875. The estate had not been closed; the executor had not filed his final account; none of the heirs had asked for partition; and, until some of these things were done, it was not only proper, but it was the duty of the executor, to pay the taxes, and prevent the property from being sold for taxes.

It is claimed there are included, in the amount for which the mortgage was given, items for needless and unauthorized litigation. The executor gave a bond at the time the mortgage was given. He will have to give an account to the probate court of his expenditure of the money received on account of the mortgage. We have already seen that debts were in existence, giving the court jurisdiction to act. The probate court, rather than here, is the proper forum to decide in the first instance whether the money has been properly expended.

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It is urged the executor had upwards of $30,000 in his hands that he had improperly retained in the way of compensation, and that this order ought not to have been made. We have already said that the petition was sufficient to confer jurisdiction upon the court, and that his order cannot be attacked in this collateral proceeding. The executor has not filed his final account. If he has received moneys for which he has not properly accounted, the probate court or the court in chancery is entirely competent to deal with that question in a proceeding in which it is directly involved.

There are other questions raised by counsel, but, in view of the effect of the order made by the probate judge, we do not think they can be raised in this proceeding, and it will not be profitable to discuss them further.

It is urged in defendants' brief that the decree authorizes the sale of the entire property, instead of authorizing the sale of a two-thirds interest therein on one mortgage, and a one-third interest therein on the other. The language of the decree is somewhat ambiguous, and it may be modified in that respect so that there can be no question about its meaning. When so modified, it will be affirmed, with costs to appellees.

The other Justices concurred.

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WALKER v. SYMS.

1. BUILDING CONTRACTS — BRICK MEASUREMENTS — GENERAL CUSTOM.

Where a building contract provides that brick furnished and laid shall be paid for at a stated amount per thousand, "measured in the wall," and is silent as to the method of measurement, a general custom of making such measurements without deductions for openings for doors and windows will prevail.

2. SAME—CONSTRUCTION—ARCHITECT AS ARBITRATOR.

A provision in a building contract, that any question that may arise between the parties "as to the true intent and meaning of the plans and specifications" shall be referred to the architect for final determination, confers upon the architect no authority to decide as to the method of measurement of brick used in the walls.

3. SAME—ACTION ON CONTRACT—MECHANIC'S LIEN LAW.

The failure of a building contractor to furnish to the owner a sworn statement as to the amounts due to subcontractors, laborers, and material men, as required by the lien law (Act No. 179, Pub. Acts 1891, § 4), will not prevent his recovery on the contract, where it appears conclusively that none of such persons are in a condition to assert a lien, or to subject the owner to litigation. So *held*, where suit was commenced more than two years after the work had been accepted by the owner.[1]

Error to Berrien; Coolidge, J. Submitted June 17, 1898. Decided September 20, 1898.

Assumpsit by Thomas A. Walker against William E. Syms and George E. Dudley to recover a balance due upon a building contract. From a judgment for plaintiff, defendants bring error. Affirmed.

[1] See *Martin* v. *Warren*, 109 Mich. 584, where it was held that the mere lapse of the 60 days limited for the filing of liens by subcontractors, laborers, and material men did not relieve the contractor from the necessity of furnishing the statement as a condition precedent to his right to maintain a bill to enforce his lien.

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A. Plummer and *Edward Bacon*, for appellants.

L. C. Fyfe and *M. L. Howell*, for appellee.

MOORE, J. This case comes here upon special findings of the court. The bill of exceptions does not purport to contain all the testimony taken upon the trial. The plaintiff is a builder and contractor. In August, 1893, he entered into a written contract with defendants, to erect for them a large factory building. Soon thereafter he entered upon its construction. It was completed, and the defendants took possession of it, in November, 1893, and were in possession when this suit was tried. A controversy arose as to how much was due from defendants to plaintiff. They were unable to agree upon the amount. Plaintiff sued defendants, and recovered a judgment against them, from which judgment defendants appeal.

Those portions of the contract important in this discussion read as follows:

"The said party of the first part further agrees that all work performed under this contract shall be done in strict accordance with the plans and accompanying specifications prepared for the erection of the said buildings by E. A. Ellsworth, architect; and any questions that may arise between the said parties to this contract as to the true intent and meaning of the said plans and specifications shall be referred to the architect (or, in his absence, to Louis R. Lavalle, representing the said architect as superintendent of construction), whose decision shall be final and binding upon both parties to this agreement. The entire work, when finished and completed, shall be subject to the final examination of the said architect, and all shall be made to meet his acceptance truly to the requirements of the specifications before this contract will be acknowledged and accepted as complete by the said parties of the second part. * * * And it is further agreed by the said party of the first part that all work shall be finished and delivered up to the said parties of the second part free from all mechanics' liens or other claims upon the same. And the said parties of the second part, in consideration of the complete fulfillment of all the conditions hereinbefore set forth, covenant and agree, for themselves, their heirs, executors,

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or administrators, with the said party of the first part, to well and truly pay to the said party of the first part a sum of money equal to eight and twenty-five one-hundredths ($8.25) dollars, lawful money of the United States of America, for each and every thousand of brick, and part thereof in like proportion, measured in the walls, at the rate of twenty-two and one-half (22½) brick per cubic foot of wall; the said price being based on the cost of said brick, delivered on the site of the said proposed buildings, at the rate of five and fifty-five one hundredths ($5.55) dollars per thousand (actual count)."

The first dispute between the parties grows out of the measurement of the work. It is the claim of the plaintiff that the measurements should be controlled by the custom in Michigan, which he claims is to measure the outside of the wall, not deducting anything for the openings made by doors and windows; he contending the custom is a reasonable one, as the construction of the wall without openings takes less time and costs less than one with many windows and doors. It is the claim of defendants that they were ignorant of any such custom, and that the space occasioned by the doors and windows should be deducted from the measurements. The circuit judge found that the contract did not provide for any particular method of measurement, and did not leave the method of measurement to the architect or superintendent, and that the language of the contract was ambiguous as to the method of measurement. He also found that, at the time when the contract was made, there was existing in this State, and many of the other States, a custom, which was uniform, general, of long standing, and reasonable, in measuring brick walls, of counting the openings as part of the solid wall, and that plaintiff, in making his contract, relied upon this custom. In the disposition of the case by the circuit judge, he treated the openings as part of the wall. Was he justified in doing so? An inspection of the contract shows no method was pointed out of making the measurements. It also fails to show, in case of a disagreement between the parties as to the method, that the

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architect or superintendent shall determine. The matters so referred to them are "any questions that may arise between the said parties to this contract as to the true intent and meaning of the said plans and specifications." This language is not broad enough to convey the authority to decide the disputed question of method of measurement. The contract, then, not providing for the method of measurement, how shall it be decided, except by the custom of the place where the contract is made and performed?

In *Lowe* v. *Lehman*, 15 Ohio St. 179, there was a written contract for the construction of a brick wall, where payments were to be made for the brick furnished and laid in the wall, at $6.25 a thousand. The contract was silent as to the method of measurement. Parol proof was given as to the custom which controlled such measurements. This was said to be error, *first*, because it contradicted a written instrument by parol, and, *second*, because the custom was unreasonable. In affirming the judgment of the court below, this language is used:

"We are unable to see anything unreasonable in the custom. The workman was to furnish the brick and materials, and lay them up, by the thousand. The contract contains no specification of the dimensions, shape, angles, openings, or arches of the wall, or of the size of the brick. It does not require a mason to know that the value of the work and materials depends much upon these and such like conditions, if they are to be paid for by the numerical thousand. Again, the brick are to be 'furnished' as well as to be laid up. Where and how will you count them numerically? Will you count them at the kiln, on the ground, or in the wall? And who will lose the breakage in transportation and in handling, and the waste of filling them into the wall? Some fair measurement of the wall would seem to be a more reasonable method. And we cannot say that this method was not a fair one. It slightly increased the estimated number of bricks in the wall, it is true, by making small additions for extra work, and extra waste of brick, at the angles and openings; and the rule of measurement adopted fixes upon an arbitrary and uniform dimension for the average

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size of the brick, which may vary slightly, but cannot vary much, from their true average size. All this seems to us reasonable.

"Neither do we think that proof of this custom is objectionable on the ground that it contradicts the contract. Authorities to support this view are numerous and almost uniform, and the rule is of every-day application. It is applied to shingles, to printers' ems, to lumber, etc. It is applied to measures and weights of numerous commodities. A ton of one article often contains over, and sometimes under, 2,000 pounds, and not unfrequently more pounds in one place than in another. In 2 Pars. Cont. the author says that custom 'may give to words of number an entirely different sense from that which they usually bear.' He cites numerous cases to that effect. Among them are *Smith* v. *Wilson*, 3 Barn. & Adol. 728, where '1,000 rabbits' was held to mean 1,200 rabbits, by the custom; and *Hinton* v. *Locke*, 5 Hill, 437, where '12 shillings per day' was made to mean 12 shillings per 10 hours, or 1¼ days for every day on which 12½ hours' work was done. But it is useless to multiply authorities. The reason and necessity of the rule lies at the foundation of all language. It is as true now as it was in the time of Horace that custom is at once the arbiter and standard of language,—'*Usus, quem pene et jus et norma loquendi.*' It belongs to the imperfection of language that while much the larger part of its words become, by usage, fixed and universal in their meaning, yet some of them must always be left subject to the changes and variations necessarily occasioned by local usages and the customs of trades.

"We are of opinion, therefore, that proof of this custom was properly admitted by the court. We hold that it was not necessary to set it out in the petition; that it was a reasonable custom; and that it does not contradict or vary the written contract in any objectionable sense."

In *Patterson* v. *Crowther*, 70 Md. 124, the same doctrine is held. See, also, *Walls* v. *Bailey*, 49 N. Y. 464 (10 Am. Rep. 407); *Breen* v. *Moran*, 51 Minn. 525; *Miller* v. *Botto*, 79 Ill. 535. The following cases, though not directly in point, bear upon the question: *Merick* v. *McNally*, 26 Mich. 374; *McDonnell* v. *Ford*, 87 Mich. 198.

Before bringing this suit, plaintiff had not made out and

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given to the owners a statement under oath of the number and names of the subcontractors, laborers, and material men. It is claimed that, under the provisions of section 4 of Act No. 179, Pub. Acts 1891, this action cannot be maintained because said statement was not furnished. The trial judge found that no statement of this kind was ever requested, and that, when this suit was commenced, all laborers and contractors had been paid in full, and that all the labor done and materials furnished had been paid for; and it did not appear that any laborer or material man had ever served any notice of any claim under the mechanic's lien law. He further found the work done by plaintiff was completed and accepted by the defendants, and was free from all mechanics' liens or other claims at such time. This suit was not commenced until more than two years after the building was accepted by defendants. The time in which any person could assert a lien as subcontractor, laborer, or material man had long elapsed. Section 22 of the act provides:

"Except as herein otherwise expressly provided, nothing in this act contained shall be construed to prevent any creditor in any such contract from maintaining an action thereon at common law in like manner as if he had no lien for the security of his debt."

The plaintiff in this case is not attempting to assert a lien under the mechanic's lien law. It appears conclusively the situation is such that none of the laborers, subcontractors, or material men are in a condition to assert a lien, or to subject defendants to litigation on that account. In the case of *Barnard* v. *McLeod*, 114 Mich. 73, Justice HOOKER used this language:

"We do not intend to be understood as saying that the service of such sworn statement is necessarily jurisdictional, and that neglect to serve is fatal in all cases, or that it cannot be waived. Possibly it should not be allowed to stand in the way of recovery where the absence of other liens and the opportunity to effect them are conceded or obvious. This provision is a shield, and, while it

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should be given full effect for that purpose, its mission may be held to end with the possibility of such use, should such case arise."

The case suggested by Justice HOOKER is now here. The use here made of the provision of the statute is not that of a shield on the part of the owner against possible liens, but it is an attempt to use the statute to prevent the rendition of a judgment which, according to the findings of the court, ought to be rendered.

Other questions are raised and discussed by counsel, but the finding of facts conclusively disposes of them, and their discussion would be unprofitable.

Judgment is affirmed.

The other Justices concurred.

DODGE v. VAN BUREN CIRCUIT JUDGE.

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1. TAXATION—RAILROAD-AID BONDS—CONSTITUTIONAL LAW.
   The legislature cannot confer upon a township the right to issue bonds in aid of railroad companies. *People* v. *Township Board of Salem*, 20 Mich. 452, followed.

2. SAME—EQUITY JURISDICTION—INJUNCTION.
   Injunction will lie to restrain a township from negotiating railroad-aid bonds, on behalf of any taxpayer of the township whose interest is sufficient to permit him to invoke the aid of equity. *Curtenius* v. *Railroad Co.*, 37 Mich. 583, followed.

3. SAME—INTEREST OF PETITIONER.
   In such case the petitioner's interest is to be determined with reference, not to the amount of the tax for which he would be made liable because of the bonds, but to the value of his property subject to such taxation. *Fuller* v. *City of Grand Rapids*, 40 Mich. 395, followed.

4. MANDAMUS TO CIRCUIT COURT—INJUNCTION—STARE DECISIS.
   Mandamus will lie to compel a circuit judge to grant an injunc-

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tion, where it is apparent from his return that his refusal of the writ was based solely upon his opinion that previous decisions of the Supreme Court, which, if followed, would make it clearly his duty to issue the writ, were erroneously decided.

Mandamus by Thomas F. Dodge to compel George M. Buck, circuit judge of Van Buren county, to grant an injunction restraining the negotiation of certain township bonds. Submitted June 28, 1898. Writ granted September 20, 1898.

Howard, Roos & Howard, for relator.

Sam H. Kelley and *Thomas J. Cavanaugh*, for respondent.

MOORE, J. This is an application for a writ of *mandamus* to compel the circuit judge to issue a preliminary injunction. The petition shows that in April, 1898, the relator, as complainant, filed a bill in chancery against the township board of the township of Paw Paw and the South Haven & Eastern Railroad Company, in which bill it was stated that complainant was the owner of property in said township, of the value of $2,000, which was liable to the assessment of taxes; that the electors of said township had illegally voted and executed $10,000 in the bonds of said township, which had been placed in the hands of persons unknown to complainant, in trust or escrow for the defendant railroad company, to be delivered to it when it had made certain changes and improvements to its railroad property, by making it a standard-gauge road from the village of Lawton, through Paw Paw, to the village of Hartford, and erecting a freight station at or near Lake Cora, and making other improvements; that the money to liquidate said bonds must be raised by taxation; that said bonds are illegal, and will be negotiated unless an injunction is issued,—and prayed for an injunction. A temporary restraining order was issued. A time was set for a hearing of the application for an injunction. The defendants severally answered. Their answers are

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not frank, clear, and definite, but it is claimed in them that the bonds were legally issued, under the provisions of Act No. 438, Local Acts 1895. It is also claimed that the bonds have already been negotiated, but the language used is very peculiar, and there is no statement when and to whom they were negotiated. A hearing was held, at which the court evidently was not impressed with the statement that the bonds had been negotiated, or had been issued for other purpose than to aid in making improvements to the railroad property. This is indicated by the language of the court in the disposition of the motion:

"The court is strongly of the opinion that, if the bonds which are the subject of this controversy are invalid, then the complainant is entitled to the temporary injunction asked for in this motion. This view renders it necessary to examine the question of the validity of the bonds, upon the assumption that they were issued as a bonus to the South Haven & Eastern Railroad Company, in consideration of the making of certain changes and improvements in the road and railroad property of the company. * * * There can be no question but that, according to the decisions of the Supreme Court of Michigan in the cases of *People* v. *Township Board of Salem*, 20 Mich. 452 (4 Am. Rep. 400), and *People* v. *State Treasurer*, 23 Mich. 499, a municipal corporation of this State has no authority to issue its bonds in aid of a private corporation building, or proposing to build, a railroad to be owned and controlled by the corporators, and that the legislature cannot, under the Constitution, authorize the issue of such bonds, either with or without a vote of the electors of the municipal corporation issuing them."

The judge then reviews the cases, and claims the views of this court as expressed in its opinions are not in harmony with the decisions of many of the State courts, or with the courts of the United States, and then proceeds:

"The decision in the case of *People* v. *Township Board of Salem* rests on the assumption that 'a corporation created for the purpose of constructing a railway to be owned and operated by the corporators is a private corporation, and that the road when constructed will not be a public highway, except in a very qualified sense, as it

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accommodates the travel and traffic of the public, and is therefore no more a public object than any other private enterprise which also supplies a public want or furnishes to the public a convenience.' To this proposition my reason refuses assent."

The judge then argues that railroads are not private corporations, and proceeds:

"It might be suggested in behalf of the complainant that, inasmuch as the decisions of the Supreme Court of Michigan have been to the effect that municipal corporations in this State have no constitutional right to issue bonds in aid of the construction of railways, this court ought to follow those decisions. But the experience of this court has not been such as to encourage the adoption of this suggestion."

The judge then reviews some cases heard by him, appealed to the Supreme Court, in which the court did not agree with the circuit judge as to the effect of its earlier decisions, and then proceeds:

"The doctrine of *stare decisis* is a salutary one, when applied within proper limits. But a decision which is radically wrong in principle ought not to be followed, no matter how long it may have been acquiesced in or how many times it may have been followed. * * * In this State the authority for holding that municipal corporations have no constitutional right to vote aid to railroad companies in the construction of railways is found in the case of *People* v. *Township Board of Salem*. Believing, as I do, that the doctrine of that case is radically wrong, and has been overthrown by the decisions of the Supreme Court of the United States, I must decline to follow it. The motion for an injunction should be denied."

In the answer filed in this proceeding by the circuit judge, he says he was so firmly convinced of the correctness of the views expressed by him in his opinion, of the constitutionality of the act in relation to the issuing of the bonds, that he did not deem it necessary to consider the other questions in the case. It may be necessary to consider them briefly here.

First, it is said complainant has an adequate remedy at

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law. This suggestion is met by the case of *Curtenius* v. *Railroad Co.*, 37 Mich. 583, where it is held that a bill like the one filed in this case can be filed under the circumstances shown by this case.

It is said that, as it is not shown the taxes of complainant would amount to $100, he cannot maintain this bill. The allegation is that the property subject to taxation, and which might be sold for the tax if it was unpaid, is of the value of $2,000. The case is governed by *Fuller* v. *City of Grand Rapids*, 40 Mich. 395.

It is urged that Act No. 438 of the Local Acts of 1895, under which these bonds were issued, is constitutional. If that act is to be interpreted as authorizing the issuing of bonds in aid of railroad enterprises, and if that was the purpose of procuring its enactment, it is a scheme evasive in character, in which the attempt is made to defeat the plain provisions of the Constitution, as interpreted by the courts. *Common Council of Cedar Springs* v. *Schlich*, 81 Mich. 405 (8 L. R. A. 851). Whether legislation of this character is constitutional or not is no longer an open question in the courts of this State. Prior to 1870 the disposition on the part of townships, cities, and villages of this State to vote municipal aid to railroads and other corporations was so widespread that had it not been for the wise provisions of the Constitution, as interpreted by the courts, these municipalities in many instances would have so incumbered themselves with debt, in aid of enterprises which were not needed, as to be a serious menace to their prosperity. Many aid bonds had been issued, and others were to be issued. The question was raised in the case of *People* v. *Township Board of Salem*, 20 Mich. 452 (4 Am. Rep. 400). Because of the magnitude of the interests involved, the case excited widespread attention. The parties in interest were represented by as able counsel as ever appeared in any one case before any court in this State. The case was given patient and careful consideration by the court, whose membership then, in point of

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ability, was not excelled by any State court. The opinion was written by one of the ablest jurists this or any other country has ever known. Justice COOLEY was then at the height of his great powers. In an elaborate and well-considered opinion, in which all the questions involved were ably discussed, it was held that legislation of this character was unconstitutional. A year later the question was again raised, in *People* v. *State Treasurer*, 23 Mich. 499. The learned justice who wrote the opinion in *People* v. *Township Board of Salem*, *supra*, wrote the opinion in this case, and, referring to the prior case, said:

"Our conclusion, therefore, was that the legislature could neither compel the taxation of municipalities in aid of railroad companies, nor could it empower them, in order to give such aid, to tax themselves, or to contract indebtedness which must be paid by taxation. * * * The conclusion reached by the majority of the court was one which struck at the root of all the legislation of which the act in question was an instance. We found no warrant for it in the Constitution. On the contrary, we found that it assumed to take from the citizen his property under a pretense of taxation, but in a case and for a purpose not admitting of an exercise of that power. Our Constitution has carefully provided a shield against an invasion of the citizen's right to his property, in the provision which guarantees to every person due process of law. Article 6, § 32. To take a man's property from him under pretense of taxation, for a purpose for which taxation is not admissible, is not due process of law, but is an unlawful confiscation."

Justice GRAVES, who wrote a dissenting opinion in the *Salem Case*, concurred in this.

The question again arose in 1873, in the case of *Thomas* v. *City of Port Huron*, 27 Mich. 320, where Justice COOLEY wrote the opinion, in which the doctrine of the two other cases was reaffirmed.

The townships and municipalities ceased to vote aid to corporations. The people indicated no desire to change the Constitution so that this might be done. For a quarter of a century the doctrine announced in the case of

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People v. *Township Board of Salem* has been regarded as the settled law of this State, and, so far as we know, has gone unchallenged in any of the courts of this State until a different rule was announced in this case. Section 3, art. 6, of the Constitution of this State, provides:

"The Supreme Court shall have a general superintending control over all inferior courts, and shall have power to issue writs of error, *habeas corpus*, *mandamus*, *quo warranto*, *procedendo*, and other original and remedial writs, and to hear and determine the same. In all other cases it shall have appellate jurisdiction only."

Our attention has not been called to any constitutional provision authorizing the judge of a circuit court, however learned and able he may be, to overrule the decisions of the Supreme Court. So, the doctrine of *People* v. *Township Board of Salem* must still be regarded as the law in all of the courts of the State.

It is urged the granting or refusing a writ of injunction calls for the exercise of his discretion upon the part of the judge, and will not be reviewed by *mandamus;* counsel citing 1 High, Inj. (3d Ed.) § 15, *Reddall* v. *Bryan*, 14 Md. 444 (74 Am. Dec. 550), and *Lansing Lumber Co.* v. *Ingham Circuit Judge*, 108 Mich. 305. It is true that courts hesitate to review the action of a trial judge involving matters of discretion, and will not do so unless it is necessary that justice may be done. In the note to section 15, 1 High, Inj., it is said: "This discretion, however, is by no means an arbitrary one, and is to be exercised in accordance with established principles of law and equity." In the case of *Lansing Lumber Co.* v. *Ingham Circuit Judge*, *supra*, the writ of *mandamus* was issued. In *Tawas, etc., R. Co.* v. *Iosco Circuit Judge*, 44 Mich. 479, a writ of *mandamus* was issued to set aside an injunction; the court holding it was a prerogative writ, designed to afford a summary and specific remedy, where the party applying for it would otherwise be subjected to serious injustice. In this case the circuit judge said, if the decisions of this court are to control, the relator was

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entitled to the writ of injunction. It is not a case where, in refusing the writ of injunction, the judge exercised his discretion in accordance with established principles of law and equity, but it is a case where he substituted his judgment of what the law ought to be for the law itself, as determined by the repeated rulings of this court.

The writ of *mandamus* will issue as prayed.

The other Justices concurred.

RANIVILLE *v.* KENT CIRCUIT JUDGE.

GARNISHMENT—EXAMINATION OF GARNISHEE—NOTICE.

The provision of 2 How. Stat. § 8061, giving to the plaintiff in garnishment proceedings the right to bring the garnishee before the circuit judge or a circuit court commissioner for examination, upon a notice of "not less than three nor more than ten days," unless such time is enlarged by the court, has reference to resident garnishees only.

Mandamus by Felix Raniville to compel William E. Grove, circuit judge of Kent county, to vacate an order setting aside the default of a nonresident garnishee defendant. Submitted June 28, 1898. Writ denied September 20, 1898.

Rood & Hindman, for relator.

McGarry & Nichols, for respondent.

MONTGOMERY, J. The question which relator's counsel present in this case calls for a construction of a portion of section 8061, 2 How. Stat., relating to the proceedings against garnishees. The provisions are:

"If such plaintiff shall file in said cause a demand for the examination of such garnishee before said judge or a

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circuit court commissioner, and shall cause a copy of the same to be served on such defendant, with a notice from the plaintiff or his attorney requiring such garnishee to appear before the judge or a circuit court commissioner, at a time and place to be named in such notice, not less than three nor more than ten days after service of such notice, which time may be enlarged by the judge or commissioner on special cause shown, and submit to an examination, on oath, concerning all matters of his liability as such garnishee under this act, which copy shall be served, and such service proven, when required, in the same manner as in cases of service of a declaration in suits commenced by declaration, such garnishee defendant shall appear and submit to such examination as required by such notice. And if such garnishee shall fail to appear for examination at the time and place appointed by such notice, or if such garnishee shall fail or refuse to file his answers to such written interrogatories as required by this act, or if such answers are not full and responsive to such written interrogatories, the judge of the court, or a circuit court commissioner, upon application of the plaintiff, shall make an order that the garnishee do appear before him and submit to such examination at such a time and place to be named in such order."

This is followed by a provision authorizing entry of default in case of failure to appear.

The question presented by the relator's counsel in this case is: Can a nonresident garnishee defendant, who has been served with original process in the suit, and who has responded by filing a disclosure, be required to appear and submit to an oral examination before a circuit court commissioner on a notice of from three to ten days? The question has never before been raised in this State, and our attention has not been directed to any decisions in other States which throw any light upon the subject. The relator's counsel contend that, as the words employed in this provision of the statute are general and sufficiently comprehensive to include all garnishee defendants, they manifest a legislative intent to bring nonresidents as well as residents within its terms. We cannot accept this view as to the legislative intent. In this case the gar-

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nishee defendant resides in New York. It might happen that the garnishee defendant resided in Hawaii, and yet, if the relator's contention be allowed, he might, after having filed his disclosure, and having departed to his home, be required to return and attend upon an examination, or he would have the alternative presented of awaiting in this State the decision of plaintiff's counsel as to the course which he should think best to pursue. A construction entailing such hardships upon one whose only fault is to be indebted to or hold property belonging to a debtor ought not to be adopted unless imperatively demanded. Turning to the statute, we find that the time fixed for appearance is so short as to suggest that the service was intended for residents only. Furthermore, the language, "which copy shall be served, and such service proven, when required, in the same manner as in cases of service of a declaration in suits commenced by declaration," may well be construed to require a service within the jurisdiction; that is, either in the county where suit is brought, or in the county where service has been had under the provisions of section 8095.

The writ will be denied, with costs.

The other Justices concurred.

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ECKHARDT v. DARBY.

SCHOOLS—USE OF SCHOOL-HOUSE—RELIGIOUS MEETINGS.

The voters of a school district, at a meeting properly called and held, are authorized to prohibit the use of the school-house for the purpose of holding religious meetings.

Mandamus by George Eckhardt and others to compel James A. Darby and others, comprising the school board of District No. 5 in Kalkaska township, to allow relators the use of the school-house for religious meetings. The circuit judge, Fred H. Aldrich, denied the writ, and the relators sought to review his action on *certiorari*. Writ of *certiorari* denied September 20, 1898.

Totten & Phelps, for relators.

PER CURIAM. The writ of *certiorari* is denied. The voters of the district, at a meeting properly called and held, voted not to permit relators the use of the school-house for the purpose of holding meetings. Their action was regular, and authorized by the law.

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BRIGGS *v.* WAYNE CIRCUIT JUDGES.

MANDAMUS—DISSOLUTION OF INJUNCTION.

Mandamus will not issue to compel a circuit judge to dissolve a preliminary injunction, in the absence of a showing of an abuse of discretion.

Mandamus by Dexter J. Briggs to compel George S. Hosmer, Robert E. Frazer, and Willard M. Lillibridge, circuit judges of Wayne county, to dissolve a preliminary injunction. Order to show cause denied September 20, 1898.

John J. Speed, for relator.

PER CURIAM. Upon filing the bill in chancery in this case, the court issued a preliminary injunction. Answers were filed, and a motion made to dissolve the injunction. Three of the circuit judges heard the motion, and refused to grant it. We see no occasion for interfering with the discretion of the court in this matter. We think the court did right in retaining the injunction until the hearing upon pleadings and proofs. The order to show cause will be denied.

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HALL v. MANN.

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1. TAX SALES—CONCLUSIVENESS OF DECREE.
   All questions as to the validity of a tax upon land are foreclosed by a valid decree for the sale of the land for nonpayment of the tax.

2. SAME—NOTICE.
   A tax sale will not be set aside in equity because the owner of the land, a nonresident, had no actual notice of the proceedings, and supposed that the tax had been paid by one to whom he had sold the land by contract requiring the vendee to pay the taxes.

3. SAME—ENROLLMENT.
   Nor is such sale void for want of enrollment of the decree.

4. SAME—STATE LANDS—PURCHASE PRICE—APPEAL—OBJECTIONS NOT RAISED BELOW.
   An objection that a purchaser of State tax lands did not pay all taxes remaining a lien thereon at the time of purchase, as required by section 84 of the tax law of 1893, cannot be raised for the first time on appeal from an order dismissing a petition to set aside the sale.

5. SAME—REMANDING RECORD—AMENDMENT.
   But, under the circumstances of this case, the record was remanded for rehearing, with leave to amend the petition.

Appeal from Muskegon; Russell, J. Submitted February 2, 1898. Decided September 20, 1898.

Petition by Alice A. Hall against M. E. Mann and George F. Brown to set aside a tax sale. From a decree dismissing the petition, petitioner appeals. Reversed on terms.

Brown & Adams, for petitioner.

Black & Brown (*Fred A. Maynard*, Attorney General, of counsel), for defendants.

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MOORE, J. This is an application for a rehearing, with leave to appear and answer the petition of the auditor general in a tax proceeding. The petition claims the proceedings were void:

First. Because the owner was a nonresident of the State, who had sold the land upon a contract, to a purchaser who was to pay the taxes; that the purchaser was also a nonresident, who sent the money to pay the taxes to his brother, who was a resident, but who failed to pay the taxes.

Second. Because the owner had no notice of the tax proceedings until after the deed had been issued by the State to the defendants.

Third. Because included in the tax was a drain tax, which tax it is alleged is "illegal and void for the reason that the officers of the law failed to take the necessary proceedings to establish said drain and to perform their duty in the manner and at the time required. Said drain tax, as well as other taxes, are therefore illegal and void, and the decree as well, for the following reasons:

"1. That there is no release of any right of way for said drain by the owners of the land along which said drain was constructed, and no release by your petitioner.

"2. That no application was ever made to the probate court, as required by law, for the appointment of commissioners to determine the necessity for such drain, and for taking of private property for the use and benefit of the public, and for the just compensation to be made therefor.

"3. That there has been no notice or citation from the probate court to the owner or occupant of said lands to show that they were to be affected, or her rights were to be in any way involved.

"4. That said drain taxes are void for the reason that there was more than twice as much attempted to be assessed and collected against said land as was authorized or necessary; there being about $1,074.45 levied for drain purposes for said year, when there was only about $440.54 required to be expended or authorized by law if the proceedings had been legal.

"5. That there is no order of the board of supervisors of the county of Muskegon directing said drain taxes to be spread upon the tax roll of the year 1893, as required by law.

"6. That the papers and records necessary to show the

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history and proceedings in this cause, which are required to be made by the county drain commissioner, were never deposited or filed in the county clerk's office for over 10 months after the tax was spread upon the tax roll. Consequently said drain taxes are unauthorized, and illegally spread upon the roll, and are therefore void.

"7. That said lands were assessed in one parcel by the supervisor of the township in which they are located, but at the sale were sold in separate parcels; that, at some time between the time of assessment and the sale for taxes, said land was separated in different parcels, and the tax apportioned, by some person not authorized by law, without regard to the different values of the separate parcels,—the same amount of general taxes being levied on the north 40 acres of said land as the south 40 acres, whereas the south 40 acres was worth twice as much as the north 40.

"8. Because the board of supervisors of said county of Muskegon, in 1893, borrowed and raised by taxes more than $1,000 for constructing and repairing public buildings, highways, and bridges within said county, without such action having first been authorized by a majority of the electors of such county voting thereon, contrary to the Constitution of the State of Michigan.

"9. Because the board of supervisors of said county did not, at their October session in 1893, nor at any other session in that year, examine the assessment rolls of the several townships and cities in said county, and ascertain whether the relative valuation of the real property in the respective townships and cities had been equally and uniformly estimated.

"10. Because the board of supervisors of said county did not, at any session in 1893, equalize the assessment rolls of the several townships and cities in said county by adding to or deducting from the valuation of the taxable property in any of the townships or cities such an amount as, in their judgment, would produce relatively an equal and uniform valuation of the real property in the county, and enter the amount added to or deducted from the valuation in any township or city upon their records.

"11. Because said board of supervisors did not, at any session in 1893, cause to be entered upon their records the aggregate valuation of taxable real and personal property of each township and city in said county as determined by them.

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"12. Because the board of supervisors of said county did not, at their annual October session in 1893, ascertain and determine the amount of money to be raised for county purposes, and because said board did not apportion the amount so determined, nor any amount, either for county or State taxes, among the several townships in the county, as provided by law.

"13. Because the decree and other proceedings in this case were not enrolled prior to sale, or prior to the filing of the report of the treasurer, and have not yet been enrolled.

"14. No certified copy of decree was attached to tax record and delivered to the county treasurer before sale, as required by section 67, Act No. 206, Pub. Acts 1893.

"15. Because the county treasurer did not make sale of this property in the manner provided by law, said land being first offered to the person who would take the entire description for the amount charged against it."

Upon the hearing, the court declined to hear proofs, except in relation to reasons 14 and 15 of subdivision 3. The petitioner declined to offer any proofs under the ruling of the court. The petition was dismissed, and the petitioner brings the case here by appeal.

All of the questions raised by the petitioner, except the two in which the court said she might offer proof, have been decided against the petitioner in the recent cases of *Muirhead* v. *Sands*, 111 Mich. 487; *Auditor General* v. *Hutchinson*, 113 Mich. 245; *Hilton* v. *Dumphey*, Id. 241; *Auditor General* v. *Sparrow*, 116 Mich. 574; and *Hughes* v. *Jordan*, *ante*, 27.

The appellant has handed us a supplemental brief since the case of *Hughes* v. *Jordan* was handed down, in which attention is called to the fact that, when defendants obtained their deed, they did not pay all taxes then a lien upon the property. This claim was not made in the petition filed before the circuit judge, though it does appear in an affidavit attached thereto. If it had been made in the petition, and established by proof, the claim would have been well taken. As it is now made for the first time, we do not feel at liberty to consider it upon this record; but, upon the payment of costs, leave will be

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granted to petitioner to have the case remanded, with leave to file an amended petition and a rehearing in the court below; otherwise the decree dismissing the petition is affirmed, with costs.

The other Justices concurred.

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BROWN v. ANN ARBOR RAILROAD CO.

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MASTER AND SERVANT — CHANGE OF EMPLOYMENT — UNKNOWN DANGER—DUTY TO WARN—UNCOVERED HATCHWAY.

A servant who is taken temporarily from the work for which he is regularly employed, and is set to doing work of a different kind, in a strange place, has a right to assume, in the absence of any caution or warning, that there are no circumstances unknown to him, and known to the master, which render his new place of work unusually dangerous. So *held*, where an oiler on a ferryboat, in which the hatchways were always covered when not in use, was directed to perform a different kind of work on another boat, which was out of commission, without his knowing or being informed of a custom of leaving the hatchways open on boats out of commission.

Error to Benzie; Aldrich, J. Submitted June 7, 1898. Decided September 27, 1898.

Case by Jacob Brown against the Ann Arbor Railroad Company for personal injuries. From a judgment for defendant on verdict directed by the court, plaintiff brings error. Reversed.

Smurthwaite & Fowler, for appellant.

T. W. Whitney (*Alexander L. Smith*, of counsel), for appellee.

LONG, J. This action was brought to recover damages

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for injuries sustained by plaintiff, occasioned, it is claimed, by the negligence of the defendant. The case was tried before a jury, and at the close of the testimony the court directed the verdict in favor of defendant. In this we think the court was in error. It appears that the plaintiff was employed by one Thomas Cosgrove, the chief engineer of the defendant, in charge of its car ferryboat the "Ann Arbor No. 2," in September, 1896. Plaintiff was paid at first the sum of $20 per month. His work at that time was passing coal. In January following he was given the work of oiling the machinery, and his pay increased to $30 per month. He was under the direction of Mr. Cosgrove, by whom he was hired, and who directed his work and movements. He continued in this work until March 14, 1897. On that day another of defendant's boats, called the "J. C. Ford," was laid up at what was called "Woodward's Dock," in the same harbor where the Ann Arbor lay. The Ford was out of commission. Mr. Cosgrove called the plaintiff to go with him to the Ford, and assist in putting her in condition to go into commission. A man from "Ann Arbor No. 1" was also called by Mr. Cosgrove to go with them. Arriving at the Ford, the parties went down into the fire-hole by a ladder, and there attempted to go through into the engine-room. Finding they could not get through that way, Mr. Cosgrove told plaintiff to take the keys which he handed him, and "go up on deck, and get into the engine-room in some other way." Plaintiff testified, in reference to his going towards the engine-room, as follows:

"When I went up there, I could not see any way to get down, only to go forward. I did not know any other way. There was a way of going down forward through a companion-way right down next to the boiler-house there. That stairway led down to the lower deck. There were two decks. The Ford is a freight boat, with a double deck. When I got down between the decks it was dark. I knew pretty near where the engine-room was. I did not know exactly. I had never been through the boat before. I had never before that time been through any

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steamboat that was laid up and out of commission. I had never worked upon a steamboat at any time, except passing coal and greasing on the No. 2. When I landed between decks, I proceeded towards the engine-room. Mr. Cosgrove said, 'Go into the engine-room stairway,' and we would get some lights and set up the engine. I went down through there, and went just as carefully as I could walk,—slow; and I thought I was all right, and was going over to the left-hand side, and I walked right into this big hatchway. I could not see. There was no chance for me to see that hatchway at that time. The hatchway was wholly uncovered, and no coaming around it; just as level as the floor. I fell 12 to 16 feet. I broke my leg twice in two, and got a cut over the eye, and one hand was injured so I could not use it."

Cosgrove and others soon came to him and took him away.

Plaintiff further testified that he did not know anything about the various hatchways prior to receiving the injury, or the hatchways of any other steamer than the Ann Arbor No. 2. It appeared from other testimony in the case offered by plaintiff that the car ferry Ann Arbor No. 2 and other ferries have gratings over the hatchways. The hatchway on the Ford, through which the plaintiff fell, was about three feet aft of the boiler-house, and was uncovered. The superintendent of the defendant's water line, Capt. William Robertson, testified that, while the Ford was laid up, the hatches were ordered off to give ventilation to keep the boat dry. Plaintiff testified that he did not know of the custom to keep the hatchways on boats open when out of commission. Plaintiff further testified that he was not told by Mr. Cosgrove or any other person that the hatchways of the Ford were open, and knew nothing about it; that he never saw any open hatchways that were not covered by a grating, unless they were receiving or discharging freight through them. Mr. Cosgrove was not called as a witness.

It is averred in the declaration that it was the duty of the defendant, under the circumstances, to inform the plaintiff that these hatchways were open. The court below, in directing the verdict, stated to the jury that—

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"The leaving the hatchways open was not an act of negligence, and, for the plaintiff to recover, it would seem to me to be necessary for the plaintiff to show that the person directing him * * * to go through this boat, where these open hatchways existed,—that the person who directed him to go there,—had a superior knowledge to himself as to the condition of the boat; which has not been done in this case."

Capt. Robertson testified that Mr. Cosgrove had charge of this work. He was chief engineer of the defendant, had hired the plaintiff and directed all his movements, and from this record it appears he stood in place of the master. He called the plaintiff from the work in which he was regularly employed, and sent him into a place of danger, without any caution that he might expect an open hatchway. From his position there, it must be presumed that Mr. Cosgrove knew it was the custom of the defendant to leave the hatchways open while the freight boat was out of commission. The plaintiff did not know this. He had been but a short time employed on a boat, and was wholly unacquainted with freight boats, or the custom of leaving the hatchways open on such boats. He was employed as an oiler of engines on the Ann Arbor. He was taken away from his accustomed work, and, if his testimony be true, put into a dangerous place, without warning or caution, by one who stood in place of master. It is true that the rule is well settled that the servant assumes all the risks usually incident to his employment, but this rule cannot be invoked in the present case. His usual work, for which he was employed, was that of oiler; and that on another and different kind of boat. He was taken from that work, and put to do work of another kind. Plaintiff had the right to assume that he would not be put in a position of danger, in going upon the boat to aid in fitting her out. *Harrison* v. *Railroad Co.*, 79 Mich. 409 (19 Am. St. Rep. 180); *Engel* v. *Smith*, 82 Mich. 1 (21 Am. St. Rep. 549).

The court below was in error in taking the case from the jury. The question of the defendant's negligence, as

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well as the negligence of the plaintiff, should, under the circumstances here, have been submitted to the jury.

Judgment is reversed, and a new trial ordered.

The other Justices concurred.

DOHERTY v. DETROIT CITIZENS' STREET-RAILWAY CO.

STREET RAILWAYS—INJURY TO PEDESTRIAN—CONTRIBUTORY NEGLIGENCE.

A pedestrian is, as a matter of law, guilty of contributory negligence, precluding a recovery for injuries received from being struck by a street car, where, after looking up and down the track when distant therefrom some 12 feet, and failing, because his view was obstructed by a covered wagon standing backed up to the curb, to see the approaching car, which would have been visible to him had he looked again when within two or three feet of the track, he proceeded directly in front of such car. MOORE and MONTGOMERY, JJ., dissenting.

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Error to Wayne; Lillibridge, J. Submitted June 8, 1898. Decided September 27, 1898. Rehearing granted April 18, 1899. Reargued June 6, 1899. Former opinion approved September 19, 1899.

Case by John Doherty against the Detroit Citizens' Street-Railway Company for personal injuries. From a judgment for defendant on verdict directed by the court, plaintiff brings error. Affirmed.

Charles R. Whitman, for appellant.

Brennan, Donnelly & Van De Mark, for appellee.

HOOKER, J. The question in this case is whether the plaintiff was guilty of contributory negligence. The

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proof conclusively shows that he walked upon a track of a street railway, and was almost instantly struck by the car. The most favorable view of the evidence is that he started to cross the street, and, at a distance of 12 feet or thereabouts from the track, looked to see if a car was coming, and saw none, but did see a covered grocery wagon and horse between him and the approaching car. He did not look again, but walked directly to and upon the track. The grocery wagon was not upon the track, and, when the car passed it, the wagon must have been sufficiently far from the track to permit the car to pass. Hence, when the plaintiff was within two or three feet of the track, he must have had an unobstructed view of the track, and the approaching car must then have been visible to him had he looked towards it. In the case of *McGee* v. *Railway Co.*, 102 Mich. 107 (26 L. R. A. 300, 47 Am. St. Rep. 507), it was held that it was not sufficient for a man to look when 15 feet from the track, but that it was his duty to look again before stepping upon the track. This was the rule laid down as to steam roads in the case of *Houghton* v. *Railway Co.*, 99 Mich. 308. If, as contended, the plaintiff's view was obstructed by the wagon, that was a reason for greater caution. We are unable to distinguish this case from the *McGee Case*, and are of the opinion that it should be, and it is therefore, affirmed.

GRANT, C. J., and LONG, J., concurred with HOOKER, J.

MOORE, J. (*dissenting*). Plaintiff sued defendant to recover for injuries sustained by him while attempting to cross the tracks of the defendant company on Michigan avenue, at the intersection of Wabash avenue. The circuit judge directed a verdict in favor of defendant. Plaintiff appeals.

In directing a verdict, the circuit judge used this language:

"The plaintiff started from the north curb of Michigan avenue across the track. Before leaving the curb, he says

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that he listened and looked both ways for an approaching car, but saw and heard none, and that he did not look again. He passed, drawing his wheelbarrow after him, in front of the approaching team, and, without looking again, attempted to cross the north track, when he was struck by the defendant's car coming from the east, and was injured."

It was the opinion of the circuit judge that the plaintiff was guilty of contributory negligence, and that the case was governed by *McGee* v. *Railway Co.*, 102 Mich. 107 (26 L. R. A. 300, 47 Am. St. Rep. 507). Counsel for defendant also cite, in favor of this ruling, *Houghton* v. *Railway Co.*, 99 Mich. 308; *Hine* v. *Railway Co.*, 115 Mich. 204; *Henderson* v. *Railway Co.*, 116 Mich. 368.

We think the circuit judge overlooked some of the plaintiff's testimony. It was his claim that he came from the north, on the west side of Wabash avenue, to Michigan avenue; that, looking east from Michigan avenue, his view was obstructed by a team which was coming from the east, which team was on the north side of the street-railway tracks, and also by a grocer's wagon, still farther east, which was backed up to the curb, the horse's head reaching towards the railway tracks. The record shows that from the curb to the rail was 16 feet. The plaintiff testified he intended to cross Michigan avenue at the crossing designed for foot passengers.

"When I arrived at that crossing, I looked west to see if there was any car. A car had just gone by from the west, down to the city, and I stood and looked east and west, and could not see a car coming from the east. I saw a car going east, on the south track, which went east before I passed. In the west I could not see a car. Looking to the east, I saw a team of horses and a covered grocery wagon. * * * Besides the team and sleigh, I saw a grocery wagon standing between the butcher shop belonging to Slitts, on the east and north corner,—the northeast corner. That faces on Michigan avenue. The wagon was backed up to the curb, and the horse was standing out towards the street-car track. The wagon was like a grocery wagon. It had a top to it. As I was

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looking, I listened for another car. I stood on the curbstone. I did not hear any alarm of any kind. When I did not see any car coming, I undertook to go across, and then the car came right onto me. * * * When I saw the car, I was very near the track,—right near the track. * * * The car was going west from the east, and no bell or alarm was sounded from that car before I saw the car. When I first saw the car, I should say I was just about onto or very near the track. The first moment I saw the car, I dropped the wheelbarrow, and jumped back from where I saw the car. * * * When I first saw the car, it was about five or six feet from me."

On the cross-examination he testified:

"When I looked up and down the track of the street, it was about three o'clock in the afternoon. I was then about four feet from the curb on the street on Michigan avenue, when I looked both up and down. Looking down, I could not see, for a team of horses was there. * * *

"*Q.* Then, when you were three feet from the track, and the horses were 15 feet back of you, what was there, if anything, to prevent you from seeing down the track?

"*A.* The team of horses and the grocery wagon. * * *

"*Q.* If you came within three feet of that track, and the team of horses were 15 feet east of you, what was there to prevent you seeing the track or the car?

"*A.* The team of horses and the grocery wagon. The team was on the street, and I could not see the car. * * *

"*Q.* And, when you got within three feet of the track, why could you not see?

"*A.* The team of horses, and the grocery wagon was backed up; the grocery wagon and horse extended out on the street-car line or track."

This testimony shows, affirmatively, that plaintiff, after starting across the street, and when four feet from the curb, looked both up and down the street, and it is a fair inference from the other testimony that he looked when near the track, and could not see because of the team of horses and the grocery wagon. The testimony of the motorman was to the effect that he did not see plaintiff until within five or six feet of him, when it was too late to avoid hitting him. There was testimony tending to show that the car was running much faster than 15

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miles an hour, and that the gong was not rung until just about the time the plaintiff was struck. The facts do not bring this case within any of the cases cited by counsel. The question of contributory negligence was not so free from doubt as to justify the court in taking it from the jury. *Detroit, etc., R. Co.* v. *Van Steinburg*, 17 Mich. 99; *Teipel* v. *Hilsendegen*, 44 Mich. 461; *Guggenheim* v. *Railway Co.*, 66 Mich. 150; *Willet* v. *Railroad Co.*, 114 Mich. 411.

Judgment should be reversed, and new trial ordered.

MONTGOMERY, J., concurred with MOORE, J.

ON REHEARING.

HOOKER, J. The evidence in this case clearly shows that, had the plaintiff taken the trouble to look as he approached the track, he must have seen the car that struck him, in time to have avoided it. It is a logical and necessary deduction from the established facts in the case, and, being so, the court properly directed a verdict for the defendant.

Our former judgment, and that of the learned circuit judge, are therefore affirmed.

GRANT, C. J., and LONG, J., concurred with HOOKER, J.

MOORE and MONTGOMERY, JJ. (*dissenting*). For the reasons stated when the case was heard before, we think the case should be reversed.

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ACRE *v.* STARKWEATHER.

1. SLANDER — WITNESSES — PRIVILEGE — ANSWERS TO LEADING QUESTIONS.

   Defamatory words uttered by a witness in a criminal proceeding, in response to direct and leading questions put by the attorney for the person against whom they are directed, will not support an action for slander.

2. SAME—CROSS-EXAMINATION.

   Where a witness has testified on direct examination that the reputation of defendant for truth and veracity is bad, and is asked, on cross-examination by defendant's counsel, upon what he bases his opinion, his reply that defendant is a thief, —that he stole witness' clothes,—is, as a matter of law, not actionable as slander. MONTGOMERY, J., dissenting.

3. SAME—ABSOLUTE PRIVILEGE.

   Whether, in this State, a witness is privileged as to immaterial matter which he may maliciously inject into his testimony,—*quære*.[1]

Error to Clinton; Daboll, J. Submitted June 9, 1898. Decided September 27, 1898.

Case by Edward A. Acre against Scott Starkweather for slander. From a judgment for defendant, plaintiff brings error. Affirmed.

Almond G. Shepard and *Edwin H. Lyon*, for appellant.

Spaulding & Norton, for appellee.

GRANT, C. J. The plaintiff sued defendant for slanderous words claimed to have been uttered as a witness in a criminal suit against plaintiff. The suit was in justice's

[1] The authorities as to the privilege of a witness in respect to defamatory testimony are collected in a note to *Cooper* v. *Phipps*, (Or.) 22 L. R. A. 836.

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court. The testimony was not reduced to writing, and the witnesses for the plaintiff do not agree as to the manner in which the alleged slanderous words were uttered, or as to the exact words uttered. According to some of them, the slanderous words were uttered in response to direct and leading questions put by plaintiff's attorney on cross-examination. For this, therefore, no action will lie.

The testimony of plaintiff himself is that, after defendant had testified that plaintiff's reputation for truth and veracity was bad, either plaintiff's attorney or the defendant's attorney asked him what he based his opinion on, and that his reply was: "He is a thief; he has stole my paint clothes, paint brushes, and part of a harness;" and that he had had plaintiff arrested for stealing these things from him. The other witnesses agree that it was the plaintiff's own attorney who asked him the question, and this must be taken as the fact.

Assuming that the law sustains an action for slander against a witness, we are of the opinion that plaintiff has not brought his case within the rule of those authorities which sustain the right of action. The witness, who is not a lawyer, is not cognizant of the rules of law, and cannot, for himself, readily determine the materiality or responsiveness or pertinency of his answers. He is unfamiliar with the rules of evidence. Public policy requires that he should not be trammeled with fear of a prosecution for slander. The question was a general one. It cannot be said that it is unnatural that the witness should believe that this affected his reputation in the community. The rule is not so hard as to say that the witness, in reply to a general question, where he is not cautioned by court or counsel, must, at his peril, determine the materiality and responsiveness of the question. The English courts and some American courts hold the witness to be absolutely privileged. Some of the courts of this country hold the privilege to be a conditional one. Under the view we take of the case, it is unnecessary to determine this ques-

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tion, which is before this court for the first time. All the courts which hold the privilege to be conditional are very careful to protect the privilege, and to confine the right of action within very narrow limits. *Barnes* v. *McCrate*, 32 Me. 442; *Calkins* v. *Sumner*, 13 Wis. 193 (80 Am. Dec. 738).

The verdict being one which the court should have directed, it is unnecessary to discuss the errors alleged.

Judgment affirmed.

HOOKER, MOORE, and LONG, JJ., concurred with GRANT, C. J.

MONTGOMERY, J. (*dissenting*). This is an action for slander. The declaration alleged that the defendant used the following language of and concerning the plaintiff: "He is a thief, he stole my paint brushes and painting clothes." Plaintiff gave evidence that the words charged were uttered by defendant while upon the witness stand on a trial of a case of the people against this same plaintiff in which plaintiff was charged with the larceny of some turkeys. The defendant was a witness in that case, called by the prosecution to prove that the reputation of the plaintiff was bad. He so testified. According to the version of some of the plaintiff's witnesses, he was then asked what he based that statement on, and replied using the words set out in the declaration. The testimony of defendant is that the statements made in regard to the larceny of the paint brushes and painting clothes were in response to direct questions, propounded to him while on the stand as a witness.

The only question which I think merits discussion is whether the rule of law as to the privilege which protects a witness was properly given by the circuit judge to the jury. While the authorities are not altogether harmonious as to the nature and extent of the privilege which surrounds a witness, there is a substantial unanimity among the courts of this country, and the doctrine may be stated very briefly. The witness is absolutely privileged in

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answering questions propounded by counsel on either side, and not excluded by the court. He is also protected in any statement volunteered material to the issue. And, as he is bound to use his own judgment in responding to an inquiry, he is equally privileged, even though the answer made to an inquiry be not pertinent, if he in good faith believes such answer to be called for by the question. On the other hand, if he wanders from that which he believes to be pertinent and responsive, and abuses his privilege by introducing that which is impertinent and immaterial, his privilege no longer avails him. He may not take advantage of the occasion to maliciously inject immaterial matter. See Cooley, Torts, 211; Newell, Sland. & L. 449; *White* v. *Carroll*, 42 N. Y. 166 (1 Am. Rep. 503); *Shadden* v. *McElwee*, 86 Tenn. 146 (6 Am. St. Rep. 821).

The circuit judge, in portions of his charge, stated the rule as favorable to the plaintiff as the above; indeed, it is doubtful if he drew the line of absolute privilege as favorable to the defendant as he was entitled to have it drawn; but, as the verdict was for the defendant, he is not complaining of this. The plaintiff, however, contends that in other portions of his charge the plaintiff's right to recover was made to depend, not upon the question of whether the testimony was material or responsive to questions proposed, but upon the belief of the defendant in the *truth* of the testimony given. The summing up of the circuit judge upon this point was as follows:

"If you find that the accusation was true, that is a defense to the action, because then he had only said what was true; and, as I have already said to you, if you find from all the evidence—the evidence of Mr. Starkweather and all the surroundings of the case—that he really at the time believed Acre had stolen those articles, and that when he answered in justice's court he was fairly giving his belief as to that, then, so far as this action is concerned here, it amounts to the same thing as though it was actually true, because then he would be testifying honestly and in good faith, and not with malicious intent. In an

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ordinary case of slander, if a man makes an accusation against a man, the law presumes that to be false, and presumes it to be malicious, because he has made a statement accusing the man of a thing that is actionable of itself; but in this case the question of privilege, by his being a witness upon the stand, changes that, and he cannot be held liable unless the plaintiff, by his evidence here, has satisfied you that there was actual malice upon his part,—that is, that he acted with a determination, with the intent, and for the purpose of doing the man an injury, knowing that what he said about him was false. And if you find that the plaintiff has established that,—*i. e.*, that what he said was not true, that he did not believe it to be true, that he simply said it to vent his spite or malice upon the other man, and to do him an injury, rather than to give his evidence fairly in the case,—then the plaintiff has made out a case, and would be entitled to recover damages at your hands."

I think these instructions open to the criticism made by plaintiff's counsel. If the defendant, though believing the plaintiff guilty of the offense which his language imputed to him, knowingly sought unwarranted occasion to make the charge, his privilege ceased, and he became responsible for the slander.

For this error the judgment should be reversed, and a new trial ordered.

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CHURCH v. ANTI-KALSOMINE CO.

1. ACTIONS—TORTS—CONTRACT AS BASIS.
The fact that a cause of action arises because of contract relations between the parties does not necessarily preclude the action's being framed in tort, where a considerable part of the case rests upon matters outside of, though connected with and dependent upon, the contract.

2. SAME—EQUITY JURISDICTION—FIDUCIARY RELATIONS.
A declaration set forth a contract under the terms of which defendant, a corporation, agreed to purchase and protect certain patents in which plaintiff was interested; to continue plaintiff in its employ at a stated salary; and to divide with him annually the net profits of the business in excess of a specified sum. Damages were asked for the wrongful and fraudulent destruction of profits which should have accrued to plaintiff under the contract. There was no allegation that defendant had in its hands profits, money, or property in which plaintiff was entitled to share. *Held*, on demurrer, that no such fiduciary relations were shown as to give equity exclusive jurisdiction.

3. SAME—LEGAL REMEDY—ACCOUNTING.
A court of law may take jurisdiction of an action to recover unliquidated damages for a fraudulent breach of contract, although the declaration shows that an extensive, though not complicated, account must be taken in the case.

4. SAME—COMPULSORY REFERENCE—AUDITORS OF ACCOUNT.
An objection that the remedy at law is impracticable in such a case, because of the inability of a jury to retain the items of the account, is without force, in view of 2 How. Stat. § 7378, authorizing a compulsory reference of matters of account in actions at law where no jury is demanded, and 2 How. Stat. §§ 7386, 7391, authorizing the appointment of auditors, when a case is at issue, to investigate such accounts, and making the report of the auditors competent evidence.[1]

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[1] The effect of a compulsory reference as a denial of the right to a jury trial is the subject of a note to *Steck* v. *Colorado Fuel & Iron Co.*, (N. Y.) 25 L. R. A. 67.

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Error to Kent; Adsit, J. Submitted June 14, 1898. Decided September 27, 1898.

Case by Melvin B. Church against the Anti-Kalsomine Company for fraudulently destroying profits of the corporation which should have accrued to plaintiff. From a judgment for defendant on demurrer to the declaration, plaintiff brings error. Reversed.

The following is a copy of the declaration:

"(1) Melvin B. Church, plaintiff herein, by Uhl, Hyde & Earle, his attorneys, complains of the Anti-Kalsomine Company, a corporation, defendant herein, of a plea of trespass on the case, the said defendant having been heretofore summoned to answer the said plaintiff herein.

"(2) For that whereas, the said defendant is a corporation organized and doing business under the laws of Michigan, and having its principal place of business in the county of Kent aforesaid.

"(3) For that whereas, the said plaintiff heretofore, to wit, from about the year A. D. 1875, has been engaged in the perfection, preparation, manufacture, and sale of wall coatings, and has made from the time aforesaid hitherto many inventions, discoveries, and improvements in the art of wall coatings, the machinery for the manufacture of the same, and methods for using, advertising, and selling the same, and that the name of said plaintiff has become closely identified in the minds of the public, in the United States and other countries, with the said business, and that the name of said plaintiff constituted a large part of the value and the good will in trade of the said defendant hereinafter mentioned.

"(4) For that whereas, the said plaintiff, in the year 1875, invented and discovered a compound to be used in wall coatings aforesaid, composed of calcined plaster and glue, which had had, prior to the year 1892, a large sale in the United States and other countries, and the manufacture and sale of which was very profitable to the said plaintiff, and to those connected with him in the manufacture and sale thereof, and that letters patent had been issued to the said plaintiff for the invention so made, by the United States, which letters patent were numbered 161,591, and dated the 6th day of April, 1875, and, under

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the laws of the United States, would expire on the 6th day of April, 1892; and said plaintiff also obtained letters patent from the United States for an improvement made by him in the said wall-coating compound, dated April 4, 1882, and also obtained other patents relating to the business of manufacturing and producing wall-coating compound, as follows: Letters patent dated April 4, 1882,—one for a process of exterior painting, in which the wall-coating compound was used,—and also two letters patent obtained from the United States on the 13th day of June, A. D. 1882, consisting of improvements in grinding machinery for making said wall coating,—which letters patent were of great value to the said defendant, and became the property of the said defendant on, to wit, the day of its organization, and were used by it in its business; and on the 1st day of October, A. D. 1891, the said defendant was the sole owner of the said letters patent, and the sole user thereof, with the exception as hereinafter stated.

"That on or about the 1st day of February, 1885, the defendant corporation was organized for the purpose of manufacturing and selling in the United States the compound aforesaid, and other compounds of like nature, composed mainly of plaster and glue; that the said corporation assumed and took over the business of the said plaintiff and others engaged therein with him, and said defendant, on or about the 17th day of June, 1886, became the purchaser and owner of the entire capital stock of a corporation known as the 'Alabastine Company,' organized under the laws of the State of New York; that from the organization of defendant company, and during all the time aforesaid, until the 1st of October, A. D. 1897, said plaintiff was the manager and director of the said business so carried on by the said defendant, and was a stockholder in said defendant; that prior to the 27th day of January, A. D. 1892, the business of the said defendant had become of great value and very profitable to it, and to the said plaintiff as a stockholder therein; that the total amount of capital paid into the said corporation, aside from its earnings, was the sum of, to wit, $25,000, and that on or about the 19th day of October, A. D. 1892, the capital stock of said company was increased to the sum of $400,000, and that the increase of the property of the said defendant from the sum of $25,000 to the sum of $400,000 was solely caused by the increase of the good will

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and business of the said defendant under the management of the said plaintiff, and the increase in value of the inventions and discoveries aforesaid of the said plaintiff.

"(5) For that whereas, the business of manufacturing wall coatings, composed mainly of calcined plaster, was originally discovered and invented by the said plaintiff, and was carried on and manufactured by him, prior to the organization of the said defendant, in the year 1885, from the year 1880, the date of organization of the said Alabastine Company, and was exceedingly profitable, and paid yearly net profits averaging more than $50,000 per year, and that the investment prior and up to the year 1886, exclusive of the earnings of the said business, was about the sum of $25,000, all of which investment had, prior to the year 1886, been repaid to the investors, and that the said sum of more than $50,000 per annum was made in that part of the United States west of the State of New York, exclusive of the Pacific coast and some points on the coast of the Gulf of Mexico.

"(6) For that whereas, from and including the season of 1886 to the 1st day of October, A. D. 1891, the net earnings and profits of the business of the said defendant aforesaid were the sum of, to wit, $311,293.43.

"(6½) For that whereas, from and including the year 1886 to the 1st day of October, 1891, competition with the said defendant in the business aforesaid had gradually disappeared as far as the manufacture of wall coatings composed mainly of calcined plaster was concerned, and on, to wit, the 1st day of October, 1891, the said defendant was practically without competition in the business aforesaid in the United States.

"(7) For that whereas, the business of manufacturing, advertising, and selling wall coatings, from the time the said plaintiff engaged in said business to the 1st day of October, 1891, so carried on as aforesaid, was under the exclusive management of the said plaintiff, and that the success of the said business was due to the efforts of the said plaintiff; that the said plaintiff was constantly devising means to improve the products aforesaid, the methods of making, advertising, and selling the same, and became and was on the 1st day of October, A. D. 1891, and has ever since continued, very skillful therein, and his services to the said defendant have always been of great value.

"(8) For that whereas, in the year 1891, one Robert E.

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Haire, then in England, made a discovery which resulted in producing the said compound of calcined plaster and glue in form adapted for use by adding cold water, and that the invention of the said Haire also included the use of other materials as a base with glue in dry form, such as whiting, chalk, dry colors, etc.; that the said Haire also discovered a process for producing the same; and that the said plaintiff also invented, during the year A. D. 1891, while in England, a process for producing the same result, based on the discovery aforesaid of the said Haire, for producing the same compound, but different from the process aforesaid of the said Haire; that the discoveries and inventions of the said plaintiff and the said Haire were of great value, for the reason that prior thereto all dry preparations for producing adhesive wall coatings, and containing animal glue as an adhesive, composed of plaster, whiting, dry colors, or any such dry base, had required hot water to prepare them for application to walls and like surfaces with the brush; that the value of the said discoveries and inventions for use in the United States and Mexico, properly managed, was at least the sum of $1,000,000; that the said discoveries and inventions were and are generic,—the first of the kind to be made; and that letters patent covering the discovery and invention of the said Robert E. Haire were issued by the United States on the 5th day of June, A. D. 1894, numbered 521,143, the said Haire's discovery being that a dry compound could be produced mechanically, composed of animal glue and a base, in such a finely-divided condition as to be available for wall coating without the use of heat or chemicals for dissolving the glue; and that letters patent based upon the discovery aforesaid of the said Haire were issued by the United States to the said plaintiff on the 16th day of January, A. D. 1894, numbered 513,203, covering the other method referred to above of producing the compound in the condition described by said Haire.

"(9) And for that whereas, the said plaintiff, on the 1st day of October, A. D. 1891, by virtue of an agreement with the said Robert E. Haire, controlled the said discoveries of the said Haire for all countries; that the said agreement provided for the payment by the said plaintiff to the said Haire of a royalty for the use of the same.

"(10) For that whereas, the said plaintiff, while in the control and management of the business aforesaid, and

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about the year A. D. 1884, and prior to the organization of the said defendant, as manager of the Alabastine Company aforesaid, purchased plaster lands adjoining the city of Grand Rapids, in said county, and erected a plaster mill thereon, for the purpose of supplying the Alabastine Company aforesaid with calcined plaster of a superior quality for its business of manufacturing wall coatings aforesaid; and that the said plaster mill and lands became the property of the said defendant at the time of the purchase of the Alabastine Company aforesaid, and has so remained from thence hitherto; and from the time of such purchase until the 1st day of October, 1891, the said defendant carried on the manufacture of calcined plaster and land plaster in said mill, and, after supplying itself with calcined plaster needed for the manufacture of wall coatings and other products manufactured by the said defendant, sold the surplus product to others; and that that part of the business of said mill which consisted in the manufacture of plaster for sale to others constituted and was and is called the 'plaster business' of said defendant, and the term 'plaster business,' referred to in the contract hereinafter mentioned, was understood by the said plaintiff and the said defendant, on the 1st day of October, A. D. 1891, to mean the plaster business as carried on by other mills in said county.

"(11) And for that whereas, the said plaintiff and the said defendant, on, to wit, the 27th day of January, A. D. 1892, to wit, October 1, 1891, at, to wit, the city of Grand Rapids, in said county, made and entered into an agreement in writing, hereinafter set forth, and at the time the contract aforesaid was entered into with the said defendant so owning and controlling the discoveries and inventions of the said Haire and said plaintiff in relation to the compound aforesaid, composed of calcined gypsum and glue and other kinds of base, and the processes for its production in such form that it could be used by the addition of cold water as aforesaid, entered into the contract aforesaid, by the terms of which the said defendant was to have assigned to it the letters patent for said compound and processes when granted, covering the United States and Mexico, with the distinct understanding between the said plaintiff and the said defendant that one of the chief purposes the said plaintiff had in view in making said contract was that the said defendant, under management of the said plaintiff during the life of said con-

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tract, might establish and demonstrate the great value of the said discoveries and inventions in countries besides the United States and Mexico, for the purpose of establishing the business of manufacturing and selling wall coatings made according to the said inventions and discoveries, from which he informed the said defendant he confidently expected to receive great profits from the sale of the said discoveries and inventions and the carrying on of the business aforesaid; and that the said defendant well understood that it was important to the interests of the said plaintiff and the said defendant that the validity, utility, and value of the said letters patent so granted by the United States should be carefully protected and vindicated, not only in the United States, but wherever the same might be used.

"(12) And for that whereas, the said plaintiff, to wit, before October 1, A. D. 1891, had established a factory for the manufacture of wall coatings at the city of Paris, in the Dominion of Canada, and at the time aforesaid had also established a factory for the manufacture of wall coatings aforesaid at the city of London, England, in which factories wall coatings were manufactured according to the discovery and processes aforesaid made by the said plaintiff and the said Haire; and that on, to wit, the 1st day of October, A. D. 1891, the said plaintiff had established a foreign trade in the wall coatings aforesaid in many foreign countries, to wit, at the city of Cape Town and other points in South Africa, Melbourne and Sidney, in Australia, and other points in Australia, and in Bombay and other points in India, and numerous points in the Dominion of Canada, Great Britain, and Ireland, and other foreign countries, and that the said plaintiff, to wit, July 1, 1891, and thereafter, had purchased from the said defendant wall coatings aforesaid, to be shipped to foreign countries, and which the said defendant had shipped to foreign countries as directed by the said plaintiff, and the said plaintiff had realized large gains and profits from the foreign business aforesaid, and had introduced the goods aforesaid, and the prospect for the said foreign trade was good, and plaintiff confidently expected, to wit, October 1, 1891, to make large gains and profits out of the foreign business aforesaid, as the said defendant was then informed by the said plaintiff, to wit, at the county of Kent, aforesaid.

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"(13) And for that whereas, at the time of entering into the contract hereinafter mentioned, the said plaintiff informed the said defendant that he intended, among other things, to erect a plant for the manufacture of glue for the use of the said defendant in its business aforesaid, and thereby save to the said defendant large expense, and thereby increase the profits to the said defendant and the said plaintiff under the said contract.

"(14) And for that whereas, on, to wit, the 1st day of October, A. D. 1891, at the time of entering into the contract hereinafter mentioned, the plaintiff insisted that he should have more complete management of the business of said defendant than he had had theretofore, as hereinbefore stated; and that the said defendant then and there consented that the said plaintiff should become more completely the manager, with enlarged power, of its business, and that he should be elected the president of the Alabastine Company aforesaid; and that said plaintiff was accordingly elected president thereof, for the purpose of giving him the proper standing and influence in the trade in this and foreign countries.

"(15) And for that whereas, the said plaintiff and the said defendant, on, to wit, the 27th day of January, A. D. 1892, at, to wit, the city of Grand Rapids, in said county, made and entered into an agreement in writing, in the words and figures following, to wit:

"'An agreement, made this 27th day of January, 1892, between the Anti-Kalsomine Company, a corporation organized under the laws of the State of Michigan, with headquarters at Grand Rapids, in said State, of the first part, and Melvin B. Church, of Grand Rapids, in the State aforesaid, of the second part, witnesseth as follows:

"'The first party hereto is now, and for some years last past has been, engaged in the manufacture and sale of certain products for wall finish and wall coating, also for the filling of wood, and for other purposes, the base of which product is calcined gypsum. The first party manufactures and sells these goods in its own name, and also in the name of the Alabastine Company, a corporation of the State of New York, the entire capital stock of which belongs to the first party hereto. The second party has been connected with the first party hereto from the outset of its organization, both as a stockholder and as its manager.

"'It is claimed by the second party that one Haire, now living in England, has made a new improvement and discovery in wall coating, by means of which the product may be manufactured with

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calcined gypsum, or other suitable product, as a basis, and may be used and applied with a brush after mixing the same with cold water. In the use of the product heretofore, hot water has been necessary to prepare the article, and an improved article, which may be applied with cold water, would be superior, it is claimed, to anything now in use or heretofore known, and the ownership of such discovery and invention by the first party, it is also claimed, will result in increased gains and profits. For the purpose of this contract, it is assumed that the net profits of the first party, from all business during the fiscal year ending October, 1891, from all sources other than its "plaster business" (so called), was $40,000. The second party hereto claims that these profits can be greatly increased in the future by the introduction of the goods made according to the improved plan referred to, and he has proposed, in consideration of what follows herein, to make the first party the owner, within certain territory, of the invention and improvements in question. In addition to the invention and discovery of the said Haire, the second party also claims to have discovered and invented certain improvements, by which the same result may be produced as above outlined, but by other methods, claimed to be novel. It is also claimed by the second party that the discovery and invention of the said Haire, and also his own improvement, are severally patentable. The stockholders of the first party have duly considered the plan, and have ratified the bargain now made.

"It is therefore agreed between the parties hereto as follows:

"'*First.* The second party shall continue in the service of the company for the five fiscal years of the first party, including the present one, at an annual salary of $5,000. During the period last stated, the second party will under no circumstances or conditions engage, directly or indirectly, in any business which will be in competition with that of the first party hereto, nor be in any wise concerned in any competing business.

"'*Second.* The second party will cause and procure to be transferred to the first party the invention and discoveries of the said Haire in the direction above referred to; will also procure from the said Haire an agreement and undertaking by which he shall agree that all inventions and improvements which he shall make in the future, in the direction of wall finish or wall coating of any kind, shall belong exclusively to the first party, within the territory of the United States and Mexico; and that, whenever the said Haire shall be requested, he will make and sign such papers as may be necessary to assure to the first party the ownership of such discoveries and inventions, and will also, on request, sign such applications for patents as the first party shall deem necessary. The second party will also procure an application to be made by the said Haire for a

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patent within the United States on the inventions and discoveries already made.

"'*Third.* The second party will also, as requested, make such applications as may be necessary for the issuance of a patent or patents within the United States, covering any invention or improvement made by him in the direction in question, and will also make like applications in the future, when requested, for any further improvements. All patents which may be issued to the said Haire, or to the second party, shall belong and be assigned to the first party hereto: *Provided*, however, that the expenses attending the obtaining of such patents shall be paid by the first party to this agreement.

"'*Fourth.* The net profits of the first party arising from all business done by it, other than the plaster business, as the same shall be at the end of each fiscal year, in excess of $40,000, shall be divided equally between the parties to this agreement, and such division shall continue from year to year during the entire term of five years.

"'*Fifth.* At some time during the five years, the capital stock of the first party shall be increased to $400,000, being an amount upon which the net earnings of $40,000 referred to will pay 10 per cent. dividend.

"'*Sixth.* At the end of the said period of five years, the net profits, above the fixed sum of $40,000, during the whole period in question, shall be added together and divided by five, to obtain the annual increase of profits. The average amount so found shall then and there be capitalized on a like 10 per cent. basis, and one-half of the stock so issued shall be given to the second party as his own, and the remaining one-half shall belong to the stockholders of the first party, according to their respective holdings.

"'*Note:* In case there shall be an increase of the profits during the period in question, as expected by the parties to the agreement, the capital stock of this company, after the end of the five years, will be $400,000, being the present earnings capitalized at 10 per cent., together with the average annual increase of earnings over the said sum of $40,000, also capitalized on the same basis.

"'*Seventh.* The second party will give his best endeavors and attention to the business. He is to be at liberty, however, to give a certain general supervision to a like business abroad, in which he is interested, but not to such an extent as to interfere with or neglect the business of the first party hereto. In case the second party shall be absent from active attention to the business of the first party for a greater period than 60 days in any one year, he shall receive no salary for such greater period.

"'*Eighth.* It is agreed between the parties that the first party

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will not manufacture or sell its goods outside the United States, except Mexico; and second party will not allow any goods of a like kind, or for a like purpose, in which he is interested, or in so far as he can control the same, to be manufactured or sold within the United States or Mexico.

"'*Ninth.* The rights herein provided for the second party shall accrue to, and be for the benefit of, his heirs, executors, administrators, and assigns, as executed and delivered.

"'THE ANTI-KALSOMINE COMPANY,
"'By A. J. BOWNE, President,
"'A. D. RATHBONE, Secretary.
"'MELVIN B. CHURCH.'

"That the said contract, by the terms thereof, became operative and took effect on the 1st day of October, A. D. 1891.

"(16) And for that whereas, the said plaintiff, on the 1st day of October, A. D. 1891, by virtue of said contract, and according to the terms thereof, entered upon the management and conduct of the business of the said defendant, and fulfilled the said contract in all respects on his part as provided therein; that he procured letters patent to himself and to the said Robert E. Haire, as provided in said contract and as heretofore stated, and assigned the same to the said defendant.

"(17) For that whereas, the said defendant, on, to wit, the 1st day of February, A. D. 1892, refused to carry out the provisions of the said contract by it to be performed, and refused to permit the said plaintiff to manufacture and sell wall coatings under said letters patent last named, and delayed the introduction of the cold-water goods referred to in said contract, and for that reason, and in consideration thereof, on, to wit, the 30th day of September, 1892, by resolution, entered into an agreement with the said plaintiff extending the period of the contract above set forth one year.

"(18). And for that whereas, the said defendant, on, to wit, the 1st day of October, A. D. 1891, and from thence during all the time until the 1st day of October, A. D. 1897, in violation of said contract, fraudulently carried on, maintained, and encouraged the business of manufacturing wall coatings in opposition to the business of the said defendant, heretofore described and referred to in said contract, by means of a separate organization known as the 'Diamond Wall-Finish Company,' and fraudulently employed, as its secretary, A. D. Rathbone, the president of

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said company known as the 'Diamond Wall-Finish Company,' and fraudulently employed in its office the said A. D. Rathbone, president thereof, and also J. L. Hamilton, the vice-president thereof, who assumed, with the consent of said defendant, to interfere with plaintiff's management of said business, and fraudulently manipulated defendant's business, and discouraged its customers, by unfair and arbitrary treatment, in the interest of said Diamond Wall-Finish Company; and that the said Diamond Wall-Finish Company, so carried on, maintained, and encouraged by the said defendant, fraudulently availing itself of the knowledge obtained through the secretary and assistant aforesaid of the said defendant, of the business methods and correspondence of said defendant, from the 1st day of October, A. D. 1891, was the principal competitor of the said defendant in the business of manufacturing wall coatings; and that the said defendant fraudulently maintained the said Diamond Wall-Finish Company, and its mill and machinery, for the manufacture of wall coatings as aforesaid, and fraudulently employed numerous workmen in the manufacture thereof, and large numbers of traveling salesmen for the sale thereof, and fraudulently instructed the salesmen aforesaid to obtain the customers of the said defendant, and destroy its trade and good will, and undermine its business; and that, in pursuance of such instructions, the Diamond Wall-Finish Company, so maintained, carried on, and encouraged, entered into competition with the said defendant, and undersold said defendant, and prevented large sales of its goods aforesaid, and destroyed the profits of the said defendant thereon, and decried the merits of the goods of the said defendant, and fraudulently and falsely pretended that the goods of the said Diamond Wall-Finish Company were superior to the goods of the said defendant; and that said Diamond Wall-Finish Company infringed the letters patent so granted to the said plaintiff and the said Robert E. Haire, and other patents belonging to the said defendant; and that the said president and vice-president of the said Diamond Wall-Finish Company, during all the time last aforesaid, were actively engaged in so fraudulently obstructing and destroying the business of the said defendant, and betraying its business methods and secrets to the said Diamond Wall-Finish Company, while receiving large salaries from the said defendant, and while they were in duty bound to devote their whole time

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and attention to the successful prosecution of the business of the said defendant, aside from the said fraudulent business of the said Diamond Wall-Finish Company; and that under the like fraudulent instructions of the said defendant, its secretary and assistant aforesaid, the salesmen of the said Diamond Wall-Finish Company fraudulently claimed and pretended that the said Diamond Wall-Finish Company and the said defendant were practically one, and that the said plaintiff was the manager of the business of the said Diamond Wall-Finish Company as well as of the business of the said defendant, and fraudulently claimed and pretended that the letters patent for cold-water goods so issued to the said plaintiff and the said Robert E. Haire, as aforesaid, were invalid and worthless; and that the said defendant fraudulently claimed and pretended to the said plaintiff that the plaster business aforesaid, referred to in said contract, from the 1st day of October, A. D. 1891, to the 1st day of October, A. D. 1897, had been very profitable; and that the said defendant fraudulently credited to the said plaster business large sums of money earned by the said defendant in its business other than the said plaster business, and fraudulently credited said plaster business large sums for plaster used by defendant more than it used in its business aside from the plaster business, and fraudulently credited said plaster business more than the going price per ton for calcined plaster used by defendant in its business other than the plaster business, and fraudulently and secretly increased the expenses of the said defendant and the salaries of its servants, and fraudulently and secretly employed unnecessary servants and agents in its said business, and wastefully conducted its said business, and permitted the said Diamond Wall-Finish Company to consume its property and moneys without payment, and fraudulently paid out of its funds large sums of money, to wit, $5,000, for the benefit of said A. D. Rathbone, president, and J. L. Hamilton, vice-president, of said Diamond Wall-Finish Company, without compensation or consideration, and fraudulently expended large sums of money, to wit, $40,000, in the maintenance of the said Diamond Wall-Finish Company as its competitor; and that said defendant directed and permitted the said Rathbone and Hamilton to use the knowledge obtained by them while in the employ and pay of defendant, of the plans of defendant, to forestall such plans for the benefit of said Diamond Wall-Finish Company.

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"(19) And the said plaintiff further avers that, in pursuance of his duty as manager of the business of said defendant under said contract, he maintained and carried to a successful issue important interference suits in the patent office of the United States, in the matters of the applications of the said plaintiff and the said Robert E. Haire for the inventions aforesaid, and for the establishment of the title and validity of the said letters patent; and that the said plaintiff also instituted and carried to a successful issue, during the life of said contract, an important suit in equity, brought by him and the said Robert E. Haire, as complainants, in the high court of justice in England, to establish the ownership of the said letters patent; and that the said plaintiff also, during the life of said contract, began a second suit in the high court of justice in England, for the further protection of the title and validity to said letters patent, which said second suit involved the right of the said plaintiff and the said Robert E. Haire, and their assigns, to control the manufacture of a compound for wall coatings that could be used with cold water only, as above described, containing other bases than calcine plaster in combination with glue as aforesaid, and that the said second suit is now pending and undetermined in the English courts; and that the said plaintiff maintained and carried on the litigation aforesaid at great expense of time and money, and that the said defendant, although often requested so to do, has neglected and refused to repay him for the moneys so expended as aforesaid, to wit, the sum of $5,000. That, at about the time that the said plaintiff began the first suit in England above mentioned, the Muralo Company, a corporation organized under the laws of the State of New York, began suit against the said defendant in the circuit court of the United States for the Western district of Michigan, claiming that it was guilty of an infringement of letters patent known as the King patent; that the said Muralo Company and the said defendant in the suits brought by plaintiff as aforesaid, in England, were interested in both cases, and it was well understood that the determination of the case brought by the said Muralo Company, or the first suit brought by the plaintiff in England as aforesaid, would determine both suits; and that, after said plaintiff had prosecuted the said suit so brought by him in England to a successful issue, the said Muralo Company dropped its case against the defendant; and that the said plaintiff,

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by the litigation in England aforesaid, established the title and validity of the cold-water patents, so assigned to the said defendant, issued by the United States.

"(20) And the said plaintiff further avers that the said defendant, although often requested so to do, has refused and still refuses to pay to the said plaintiff the salary stipulated and agreed upon in the contract aforesaid, to wit, the sum of $10,000.

"(21) And the said plaintiff further avers that, in pursuance of the fraudulent scheme of the said defendant to defeat him in realizing any profit upon the said contract, and to prevent him from receiving any payment whatever for the letters patent so assigned to the said defendant, and to prevent him from establishing the value of said discovery and inventions, and to destroy the foreign business of the said plaintiff, fraudulently and secretly obstructed and embarrassed the said plaintiff in the management of the business of said defendant under said contract, and in the introduction of the said cold-water goods, and instructed the workmen, servants, and agents employed by the said defendant not to carry out the instructions of the said plaintiff in the management of said business which he might lawfully give under the said contract, and permitted the said Diamond Wall-Finish Company to secretly employ the skilled servants of defendant in its business, and secretly instructed defendant's salesmen to sell the goods of the said Diamond Wall-Finish Company, and practically deposed the said plaintiff as manager of the business of said defendant, and allowed the said president and vice-president of the said Diamond Wall-Finish Company to conduct and manage the business of said defendant in the interest of the said Diamond Wall-Finish Company, and fraudulently and falsely claimed and pretended, to wit, from the 1st day of October, A. D. 1891, hitherto, that the said defendant has not realized more than a net profit of $40,000 a year from its business other than the said plaster business.

"(22) And the said plaintiff further avers that the said defendant, in violation of said contract, fraudulently directed and allowed the said president of the said Diamond Wall-Finish Company, to wit, from July 1, 1894, to September 1, 1895, to supply from the plaster mill of the said defendant inferior gypsum for the manufacture of the said wall coatings by the said defendant, and that the said inferior gypsum was used by the said defendant in the

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manufacture of the said wall coatings, and the said goods were placed upon the market, and rejected by the customers of the said defendant because of their inferior quality, and directed and allowed said Rathbone to supply common, instead of superior, calcined plaster to defendant during the whole life of said contract, and thereby injured and destroyed the value of the said wall coatings of the said defendant in the market of the United States, and thereby deprived the said defendant of large gains and profits, to wit, the sum of $20,000.

"(23) And the said plaintiff further avers that after the execution of the contract aforesaid, and on, to wit, the 1st day of October, A. D. 1891, in violation of the said contract, the said defendant fraudulently encouraged the said Diamond Wall-Finish Company to infringe the said discovery and the said letters patent so granted to the said plaintiff and the said Haire, and the other letters patent aforesaid, and the said Diamond Wall-Finish Company, under the direction of the said defendant, during the time aforesaid, did so infringe the letters patent, and manufactured and sold in the United States, under the direction of the said defendant, large quantities of wall coatings made in infringement of the said letters patent and otherwise, and under the direction of the said defendant sold the goods aforesaid at a less price than the goods of the said defendant were sold, and undermined and destroyed the trade of the said defendant, and alienated its customers, injured its business, and destroyed its profits, and thereby the said defendant lost great gains and profits, to wit, the sum of $500,000.

"(24) And that the said defendant, well knowing that the said Diamond Wall-Finish Company was infringing the said letters patent, neglected and refused to prosecute for such infringements, and thereby lost large sums of money which it might have obtained in damages from the said Diamond Wall-Finish Company, to wit, the sum of $250,000.

"(25) And the said plaintiff further avers that a corporation organized under the laws of the State of New York, known as the 'Muralo Company,' on, to wit, the 1st day of January, A. D. 1894, and from thence until the 1st day of October, A. D. 1897, was engaged in the manufacture and sale in the United States and foreign countries, in competition with the said defendant in the United States, and in competition with the said plaintiff

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and with the defendant in foreign countries, of wall coatings manufactured in infringement of the said letters patent, and that the business of the said Muralo Company, so carried on, was a great injury to the said defendant's business in the United States, and likewise a great injury to the business of the said plaintiff in foreign countries; and that the said defendant well knew that the said Muralo Company was carrying on such illegal and infringing business, but that the said defendant, in violation of the said contract, refused to prosecute the said Muralo Company for the infringements aforesaid, and thereby lost large sums of money that it might have obtained by such prosecution, to wit, the sum of $50,000.

"(26) And said plaintiff further avers that the said defendant, availing itself of knowledge of the foreign business of the said plaintiff through the correspondence and letters of the said plaintiff received at the office of the said defendant, fraudulently directed and procured the said Diamond Wall-Finish Company, in violation of said contract, to ship wall coatings, manufactured by it, into foreign countries where the said plaintiff had established the business of manufacturing and the business of selling the wall coatings as aforesaid, to wit, Cape Town and other points in South Africa, Sidney and Melbourne and other points in Australia, to wit, Toronto and other points in the Dominion of Canada, to wit, in India, and in other countries, and thereby deprived the said plaintiff of great gains and profits which he otherwise would have made, to wit, the sum of $40,000.

"(27) And the said plaintiff further avers that on, to wit, the 1st day of January, A. D. 1892, he discovered and invented a certain method for applying compounds, composed of gypsum and other material, to wall surfaces, either in the interior or on the exterior of buildings, and on, to wit, the 30th day of October, A. D. 1892, the invention of the said plaintiff, so made as aforesaid, became the property of the said defendant; and that the said plaintiff, on, to wit, the 18th day of February, A. D. 1892, at, to wit, the city of Chicago, in the State of Illinois, made known the said invention to the managers and directors of the World's Fair, thereafter held at the city of Chicago, aforesaid; that thereafter, and on, to wit, the 6th day of December, A. D. 1892, for the said invention of the plaintiff last mentioned, letters patent were granted by the United States to Melvin B. Church, numbered 487,606, with the

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following broad claim: 'The hereinbefore described mode of applying a plastic or semi-plastic material to walls or other surfaces, the same consisting in impelling said material through a pipe and directing in a divided condition upon the said surfaces,'—which letters patent, on, to wit, February 15, 1894, together with all plaintiff's claims for infringement or royalties, were assigned in writing to said defendant by said plaintiff; that thereafter, and on, to wit, the 6th day of December, A. D. 1892, the said managers and directors of the World's Fair as aforesaid, in violation of and in infringement of the said letters patent last named, adopted the method covered by said letters patent, in infringement thereof, and used the same in the coating of the main buildings constructed for the use of the said World's Fair, at Chicago, aforesaid, and thereby greatly injured the said defendant, and deprived it of large gains and profits that it otherwise would have made, to wit, the sum of $25,000; that thereafter, and on, to wit, the 19th day of February, 1894, the said defendant instituted, in the circuit court of the United States for the Seventh circuit and Northern district of Illinois, a suit against the World's Columbian Exposition, a corporation organized under the laws of Illinois, conducting the said World's Fair, for the infringement of the letters patent last named; that the said defendant might have recovered large sums of money, to wit, the sum of $25,000, in said suit, if it had prosecuted the same, but that the said defendant, in violation of the said contract, without the knowledge of the said plaintiff, fraudulently refused to prosecute the said suit, and fraudulently and secretly discontinued the same, and thereby lost the moneys last aforesaid.

"(28) And said plaintiff further avers that, in pursuance of the policy of the said plaintiff as understood and agreed to by the said defendant, he had constructed upon the premises of the said defendant, to wit, November 1, 1892, a glue factory for the manufacture of glue for the use of the said defendant in its business as aforesaid; that the plant so constructed by the said plaintiff was imperfect in its appliances, and that, notwithstanding such imperfections, the said plaintiff thereby succeeded in making glue at greatly reduced cost, and a great saving to the said defendant; that, in order to make the same entirely practical, plaintiff proposed to the said defendant, to wit, October 1, 1893, to expend, to wit, the sum of $2,000 for

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a vacuum pan for the said glue factory; that the defendant refused to authorize the expenditure aforesaid, and thereby the defendant lost large gains and profits that it might have made if said factory had been completed as plaintiff proposed, to wit, the sum of $40,000, to wit, during the life of said contract.

"(29) And the said plaintiff further avers that the profits arising from the business of the said defendant during the life of said contract, had it not been for the fraudulent conduct of the said defendant and the wrongful actions and doings aforesaid of the said defendant, would have exceeded the sum of $40,000 per year from its business other than the plaster business, and would have reached on an average, during the life of said contract, the sum of, to wit, $120,000 per year.

"(30) And the said plaintiff further avers that, by reason of the fraudulent and unlawful conduct of the said defendant aforesaid, he was deprived of large gains, profits, and salary in the business of the said defendant in the United States, and in his business in the Dominion of Canada, England, South Africa, Australia, and other foreign countries as aforesaid, and was prevented from establishing the validity, utility, and value of the discovery of the said Haire, and the processes of the said Haire and the said plaintiff, and the letters patent granted to the said plaintiff and the said Haire therefor, and the said plaintiff was thereby prevented from realizing large gains and profits from the sale of the said discovery and inventions in foreign countries, and from the manufacture of wall coatings thereunder in foreign countries, to wit, the sum of $1,000,000.

"(31) To the plaintiff's damage of $1,000,000, and therefor he brings suit."

Uhl, Hyde & Earle, for appellant.

T. J. O'Brien (*Fletcher & Wanty*, of counsel), for appellee.

MOORE, J. The plaintiff commenced this suit in the circuit court for the county of Kent by declaration, a copy of which is found in the statement of the case. The defendant demurred to the declaration. The circuit judge sustained the demurrer. The plaintiff brings the case here by writ of error.

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Several reasons are set up in the demurrer why the declaration is not sufficient. The reasons relied upon in the briefs and arguments of counsel are:

"1. The declaration purports to be in an action of tort, but sets forth a cause of action on contract only.

"2. The cause of action set forth in the declaration is not the subject-matter of an action at law, and is cognizable only in a court of equity."

As to the first reason assigned in the demurrer, while it is true the cause of action arose because of the contract relations between the parties, a considerable part of the case of the plaintiff rests upon matters outside of the contract, not a part of it, but connected with and dependent upon it, growing out of the duty which defendant owed to plaintiff. The declaration comes clearly within *Chandler* v. *Allison*, 10 Mich. 460; *Allison* v. *Chandler*, 11 Mich. 542; *Oliver* v. *Perkins*, 92 Mich. 304; *Hanley* v. *Balch*, 94 Mich. 315.

As to the second reason assigned, it is claimed on the part of the defendant: "The contract set out in the declaration created such fiduciary relation between Church and the Anti-Kalsomine Company that a court of equity has exclusive jurisdiction of controversies which arise between them under the contract;" and that the case is controlled by *Petrie* v. *Torrent*, 88 Mich. 43; also citing *Pratt* v. *Tuttle*, 136 Mass. 233, and other cases. A reference to some of these cases shows them not to be in point, under our decisions. They state cases which are daily tried on the law side of our court without question.

The defendant also claims: "The contract between Church and the Anti-Kalsomine Company did not create a technical partnership. It did create a joint interest in the net profits of the wall-coating department of the Anti-Kalsomine Company's business, which was so far analogous to a true partnership that only the same remedies are available to the parties that would be available to actual partners;" and cites, in support of this proposition, the cases of *Marston* v. *Gould*, 69 N. Y. 220; *Channon*

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v. *Stewart*, 103 Ill. 541; *Hallett* v. *Cumston*, 110 Mass. 32.

Defendant also claims: "Equity has exclusive jurisdiction over the case set forth in the declaration in this cause, because it is too complicated in its circumstances to be tried by a jury." It is said the defendant is as much interested in the question of how the case shall be tried as the plaintiff; that it has a right to have the case so tried that there shall be a full, complete, and adequate disposition made of it. It is insisted the facts in the case are so complicated that a jury could not remember them, and a trial by a jury would be a farce. Counsel cite *Blair, etc., Land Co.* v. *Walker*, 50 Iowa, 376; *Burt* v. *Harrah*, 65 Iowa, 643; *Garner* v. *Reis*, 25 Minn. 475; *Fair* v. *Stickney Farm Co.*, 35 Minn. 380; *Hedges* v. *Methodist Church*, (Sup.) 47 N. Y. Supp. 93. These cases all arose in code states, and some of them are cases such as frequently are tried upon the law side of our courts. This case is already commenced upon the law side of the court. The defendant asks that it be dismissed, because the law side of the court will not give the plaintiff a full, complete, and adequate remedy, and because the case comes exclusively within the jurisdiction of a court of equity.

It becomes important to see just what is claimed by the declaration. It commences by giving a history of the relations between the parties which led up to the making of the contract. It sets out the contract in full. It states what duties one party to the contract owed to the other. It gives a history of transactions on the part of the defendant which were wrongful and fraudulent, which resulted in a breach of the contract on the part of the defendant, and a loss of the profits which should have been made and shared by the plaintiff. It asks damages for this wrongful and fraudulent breach of the contract. It does not show any fiduciary or trust relation between the parties different from the relation existing between the parties to any contract to observe its terms. There is no claim in the declaration that defendant has in its hands

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any property or any profits which plaintiff is entitled to share, or that there are mutual or unsettled accounts, or that the accounts are so complicated that an accounting is necessary. The claim is, in substance, that defendant fraudulently and wrongfully destroyed property and profits which should have accrued to plaintiff because of the contract relations between the parties. There is no suggestion that defendant has property in its hands as trustee for plaintiff. It does not appear that such a fiduciary relation exists between the parties as to give the court of equity exclusive jurisdiction. 1 Pom. Eq. Jur. § 157; *Ward* v. *Peck*, 114 Mass. 121; *Frue* v. *Loring*, 120 Mass. 507; *Badger* v. *McNamara*, 123 Mass. 117. Actions at law have been sustained where the fiduciary relation was said to exist. *Bennett* v. *Smith*, 40 Mich. 211; *Wright* v. *Dickinson*, 67 Mich. 580 (11 Am. St. Rep. 602); *Murphy* v. *Craig*, 76 Mich. 155; *Collar* v. *Collar*, 86 Mich. 507 (13 L. R. A. 621). But, inasmuch as the declaration does not claim that defendant has either profits, money, or property in its hands belonging to plaintiff, or in which he is entitled to share, the claim that defendant is shown to be the trustee of plaintiff is not sustained.

Upon the proposition that, inasmuch as the declaration shows there must be an accounting, therefore the case must be heard in equity, it may be said the action of account was originally cognizable only in the common-law courts, but later courts of equity exercised jurisdiction in cases of mutual account, because the remedy at law was inadequate, and have extended the remedy to many cases to which the remedy at law was never applied.

"So that now the jurisdiction extends, not only to cases of an equitable nature, but to many cases where the form of the account is purely legal, and the items constituting the account are founded on obligations purely legal. Upon such legal obligations, however, suits, although not in the form of actions of account, yet in the form of *assumpsit*, covenant, and debt, are still daily prosecuted

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in the courts of common law, and legal defenses are there brought forward. But, even in these cases, *as the courts possess no authority to stop the ordinary progress of such suits, for the purpose of subjecting the matters in dispute to the investigation of a more convenient tribunal than a jury*, unless the parties agree to a voluntary arrangement for this purpose, the cause often proceeds to trial in a manner wholly unsuitable to its real merits." 1 Story, Eq. Jur. § 442.

The case at bar is now on the law side of the court. There is a very clear intimation, in the section just quoted, that the jurisdiction is concurrent, and equity will not interfere where the case has been commenced on the law side of the court. In 1 Pom. Eq. Jur. § 179, it is said:

"In further limitation upon the power of equity to interfere where the primary rights, interests, or estates are legal, the doctrine is well settled that, when the jurisdictions of law and of equity are concurrent, the one which first takes actual cognizance of any particular controversy ordinarily becomes thereby exclusive. If, therefore, the subject-matter or primary right or interest, although legal, is one of a class which may come within the concurrent jurisdiction of equity, and an action at law has already been commenced, a court of equity will not, unless some definite and sufficient ground of equitable interference exists, entertain a suit over the same subject-matter," etc.

See note to section 179, 1 Pom. Eq. Jur.; *Northeastern R. Co.* v. *Martin*, 2 Phil. Ch. 758; *Smith* v. *M'Iver*, 9 Wheat. 532; *Bank of Bellows Falls* v. *Railroad Co.*, 28 Vt. 470; *Crane* v. *Bunnell*, 10 Paige, 333; *Mason* v. *Piggott*, 11 Ill. 85; *Ross* v. *Buchanan*, 13 Ill. 55.

If we rightly interpret the meaning of the words used in this declaration, it is a claim for a money judgment, wherein plaintiff claims unliquidated damages for a fraudulent breach of a contract. This is a proper claim to be submitted to a jury. 1 Pom. Eq. Jur. § 178; *Teft* v. *Stewart*, 31 Mich. 367; *Linn* v. *Gunn*, 56 Mich. 447; *Frue* v. *Loring*, 120 Mass. 507; *Badger* v. *McNamara*, 123 Mass. 117.

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It is urged that the accounts are so complicated that a jury could not retain the items, and a trial by a jury would be so long and so unsatisfactory as to be a farce. The declaration does not show there are mutual accounts, nor does it show there are long and complicated accounts upon one side. It is doubtless necessary, in a business of the magnitude shown to have been done by the defendant, to examine a good many books before conclusions shall be reached; but can it be said to be the law that in only simple cases, involving small amounts, may the parties insist on trial by jury? Shall it be said, if the case is one of importance, a jury trial cannot be had? There are not many important cases tried where either the court or the jury can remember all the items of testimony introduced, but aided by counsel, and by experts who go over the accounts and reach results, it is usually not difficult to administer substantial justice. There is legislation which is intended to reach such difficulties as are suggested here. If the case was tried in equity, it is not at all likely the judge would hear the testimony and examine the books personally, but would refer it to a master. If the parties desired, the court, in the action at law, could refer the case to referees. 2 How. Stat. § 7378. It is true the court cannot do this if either party demands a trial by jury within 10 days after issue. If this is done, the court is authorized to appoint one or more auditors to investigate the accounts, and take evidence in relation thereto, and to make a report thereon, which report may be used in a jury trial. 2 How. Stat. §§ 7386, 7391. The plaintiff having elected to try his case on the law side of the court, he is entitled to have it tried there, so far as anything appears to the contrary in the declaration.

The judgment is reversed, the case is remanded, and defendant is given 20 days in which to plead.

The other Justices concurred.

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FEIGE v. BURT.[1]

1. STOCK AND STOCKHOLDERS—PLEDGE—TRANSFER ON BOOKS—CONVERSION.

   A pledgee of shares of stock indorsed in blank may protect his special property therein by having the same transferred on the books of the company, and new stock issued in his name; but if he goes further, and uses such stock as if it were his own, he is guilty of a conversion.

2. SAME—SALE ON EXECUTION.

   Shares of stock pledged as collateral security for a debt of the stockholder, and transferred on the books of the company to the pledgee, cannot be sold on an execution against the debtor.

3. SAME—STATUTORY RIGHTS—STRICT COMPLIANCE.

   The right to subject shares of stock to execution being purely statutory, the provisions of the statute authorizing it (2 How. Stat. § 7697 *et seq.*) must be strictly complied with.

4. SAME—SALE AFTER DEFAULT—NOTICE.

   While stock pledged to secure the payment of a debt may, in case of default, be sold by the pledgee, without judicial proceedings, upon notice to the pledgor, a sale without notice constitutes a conversion.

5. SAME—DEMAND AND TENDER.

   When a pledgee of stock wrongfully sells it, the pledgor may sue for the conversion without first tendering the debt or demanding a return of the stock.

6. SAME—DAMAGES FOR CONVERSION—RECOUPMENT OF DEBT.

   In such action the pledgee is entitled to recoup the amount of the debt.

Error to Saginaw; SNOW, J. Submitted June 15, 1898. Decided September 27, 1898.

Trover by Ernest Feige against Wellington R. Burt and the Home National Bank of East Saginaw. From a judgment for defendants on verdict directed by the court, plaintiff brings error. Reversed.

[1] Rehearing denied January 20, 1899.

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Weadock & Purcell, for appellant.

Humphrey & Grant, for appellees.

MOORE, J. Plaintiff sued defendants, in an action of trover, to recover the value of 20 certificates, representing 800 shares of stock in the Feige-Silsbee Furniture Manufacturing Company, claimed by him to have been unlawfully converted by defendants. The circuit judge directed a verdict in favor of defendants. Plaintiff has appealed the case to this court.

Prior to 1888 the plaintiff was one of the incorporators of the Feige-Silsbee Furniture Manufacturing Company (which name was changed, later, to the Feige Desk Company). He was a borrower of the defendant bank. November 8, 1888, he pledged to the bank the certificates of stock already mentioned, indorsing them in blank, and at the same time a paper was executed reciting the deposit of the certificates, "to be held by said bank as collateral security for any obligation which I may now have or hereafter have" in said bank. May 1, 1895, Mr. Feige gave his note to the bank in the sum of $6,650, due in three months. The defendant Burt became a stockholder in the furniture company some years ago. He was its president when this note was given, and continued to be its president from that time on. Mr. Feige was a director, and for some time had been manager, of the company. Mr. Burt was also president of the bank. It is the claim of the plaintiff that Mr. Burt and the bank conspired together to depreciate the value of the stock, and to deprive him of it without compensation, and to displace him from his position as director and manager of the company. He says on February 10, 1896, the bank, without notice to him, through its president, Mr. Burt, surrendered the 20 certificates of stock, and one certificate in lieu thereof was issued to the bank for the 800 shares, and the 20 certificates were canceled. He claims the certificate so issued was never returned to the furniture company. He says Mr. Burt, as president of the company, refused to recog-

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nize him as a stockholder at the meeting of the stockholders of the company, in February, 1896; that he was then displaced as director and manager; that he was refused access to the books of the company; and that the secretary of the company and Mr. Burt declared he had no interest as a stockholder or otherwise in its affairs. He further claims that, in the annual report made to the secretary of state, it was reported the 800 shares of stock which had been previously represented as held by him were owned by the bank. He claims that what was done was done, not for the purpose of collecting the debt, but for the purpose of depriving him of his stock. It is the claim of Mr. Burt and of the bank that what they did was done in good faith; that, for the purpose of making the bank secure against possible levies by creditors, the bank had a right to surrender the certificates, and have one issued in its name; and that it did not claim to be the absolute owner of the stock as against plaintiff, but always recognized his right to it upon his payment of the debt to secure which it was turned out.

May 18, 1896, the bank obtained judgment upon the note given by Mr. Feige, and caused an execution to be issued and placed in the hands of a deputy sheriff, who served a copy of it upon the secretary of the company, who on June 10, 1896, issued the following certificate:

"C. DINGMAN,
"Deputy Sheriff for Saginaw County, Mich.

"*Dear Sir:* You are hereby notified that, as appears by the books of the Feige Desk Company, of Saginaw, Michigan, a corporation, Ernest Feige is the owner of 800 shares of the capital stock of said company, of the par value of $25 each, subject, however, to the interest therein as pledgee of the Home National Bank of East Saginaw, Michigan. Said stock is represented by certificate No. 100, issued February 10, 1896, to said Home National Bank.

"Yours truly,
"G. R. BURT,
"Sec. and Treas. of the Feige Desk Co."

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As a matter of fact, the stock at this time stood upon the books of the company in the name of the bank. The stock was advertised and sold by the sheriff for $400, and this amount was paid over to the bank. Before suit was brought, no tender was made of the debt and no demand made for the stock. It is the claim of plaintiff that what occurred in February amounted to a conversion of the stock, and that the court erred in refusing to submit to the jury the question of whether there had been a conversion or not.

Where stock is pledged to secure the payment of a debt, in default of payment the pledgee may not at once convert the stock to his own use, but he may give notice to the pledgor of an intent to sell the stock, and may so sell it, without any judicial proceedings, and apply the proceeds to the payment of the debt. 1 Cook, Stock, Stockh. & Corp. Law, § 476. A sale without a notice is a conversion of the stock; and, in the absence of any agreement, the sale must be at public auction.

It is the claim of defendants that there was no attempt to deprive plaintiff of his stock in February, and that the pledgee of shares of stock has a right to have the stock transferred, and new shares issued in his name, and that doing so does not amount to a conversion; citing Coleb. Coll. Sec. § 288; *Day* v. *Holmes*, 103 Mass. 306; *Heath* v. *Griswold*, 18 Blatchf. 555; *Heath* v. *Smelting Co.*, 39 Wis. 146; *Rich* v. *Boyce*, 39 Md. 314; 1 Cook, Stock, Stockh. & Corp. Law, § 466. These authorities sustain the position of counsel; but it is the claim of plaintiff that defendants went further than this; that they used the stock as though it was the stock of the bank, and denied that plaintiff had any right in it or in the company. Plaintiff gave testimony tending to support his claim. We think there were sufficient facts shown so the question should have been submitted to the jury.

Was there a conversion by the levy upon and sale of the stock? A share of stock is in the nature of a chose in action, and at common law a chose in action could not be

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reached by or made subject to a levy of execution. Consequently it has been uniformly held by the courts that at common law a levy of execution could not be made on shares of stock. 1 Cook, Stock, Stockh. & Corp. Law, § 480; *Van Norman* v. *Jackson Circuit Judge*, 45 Mich. 204. As the levy upon execution is authorized only by virtue of the statute, its provisions must be substantially observed. 1 Cook, Stock, Stockh. & Corp. Law, § 482. 2 How. Stat. § 7697, provides that any share or interest of a stockholder in any joint-stock company may be taken in execution. The next section provides that a copy of the execution shall be left with the person having the custody of the books and papers of the company. The next section reads:

"The officer of the company who is appointed to keep a record or account of the shares or interest of the stockholders therein shall * * * be bound to give a certificate of the number of shares or amount of the interest held by such judgment debtor."

As we have already seen, none of the certificates of stock stood upon the books of the company in the name of Mr. Feige after February 10th. This was known to the secretary of the company, and to the bank; but, knowing this, the bank levied upon the stock as though it stood in his name, sold it, and took the avails of the sale. This sale cannot be justified as an execution sale by a creditor of Mr. Feige. *Blair* v. *Compton*, 33 Mich. 441; *Van Norman* v. *Jackson Circuit Judge*, 45 Mich. 208; *Gypsum & Stucco Co.* v. *Kent Circuit Judge*, 97 Mich. 631.

Can the sale be justified as a sale by the pledgee? We have already seen the sale cannot be made until notice has been given to the pledgor of the intention to sell. "A sale without a notice is a conversion of the stock." 1 Cook, Stock, Stockh. & Corp. Law, § 477. In *Stearns* v. *Marsh*, 4 Denio, 227 (47 Am. Dec. 248), it is held, if the pledgee sell the property, without calling on the pledgor to redeem, the latter may maintain an action for the value of the thing pledged, without tendering the debt, because

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by the wrongful sale the pledgee has incapacitated himself to perform his part of the contract,—that is, to return the pledge,—and it would therefore be nugatory to make the tender; citing Story, Bailm. § 349; *M'Lean* v. *Walker*, 10 Johns. 471. In such case the pledgee may recoup the amount of his debt.

The sale made was an unlawful sale, and amounted to a conversion. The plaintiff was entitled to recover the value of the shares of stock, less the amount of the debt.

The judgment is reversed, and a new trial granted.

GRANT, C. J., HOOKER and LONG, JJ., concurred. MONTGOMERY, J., did not sit.

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RAUB *v.* NISBETT.

1. ACCOUNT STATED—INSTRUCTIONS—HARMLESS ERROR.
   An instruction that one to whom a statement of account was rendered was bound to raise objections to its accuracy within a reasonable time, and that 30 days would be a reasonable time for such purpose, is not prejudicial, as limiting him to 30 days as a matter of law, where no distinct error in the account in question is shown, and the only evidence of objection within a period of three years relates to the day after the account was rendered.

2. SAME—EVIDENCE—BOOKS OF ACCOUNT—ADMISSIONS.
   Testimony that one to whom a statement of account was rendered examined the book from which it was taken, and made no objection to its correctness, renders the book competent as an admission against him.

Error to Mecosta; Palmer, J. Submitted June 15, 1898. Decided September 27, 1898.

Samuel F. Raub presented a claim against the estate of

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Stephen S. Wilcox, deceased. The claim was disallowed by the commissioners, and claimant appealed to the circuit court. From a judgment for the estate (William P. Nisbett, administrator), claimant brings error. Affirmed.

Frank Dumon and *M. Brown*, for appellant.

L. G. Palmer and *C. H. Thrall*, for appellee.

MONTGOMERY, J. This case has once been before the court, and for a statement of the case we refer to our decision on the former hearing, reported in 111 Mich. 38. On a second trial of the case at the circuit, a verdict was rendered for the estate, the jury finding an account stated. The case is now before us for review of rulings made on this trial.

In December, 1890, the deceased rendered an account of sales and expenditures to claimant. The deceased continued to reside at Big Rapids until October 1, 1891, when he removed to West Superior, Wis. He returned to Big Rapids on one or more occasions for a visit before his death, which occurred in March, 1893. It was a matter of dispute whether the claimant objected to the account from the time it was rendered up to the time of the death of Mr. Wilcox. The claimant testified that he did object to the statement to Fred Wilcox, son of deceased, the next day after it was furnished. Fred Wilcox, on the other hand, testified that he rendered the statement to the claimant, and that no objection was made to it, except that he (claimant) thought some of the shingles were sold too low. On this trial the claimant's demand rested upon the theory that all the shingles were not accounted for. The claimant's counsel assign error upon an instruction of the circuit judge as follows:

"When the account was rendered, it was the duty of the man to examine the account, and if he did not understand it, or raised any objection to it, within a reasonable time he should have stated his reasons to the party who rendered the account. Now, 30 days would be a reason-

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able time. And if he retained the account longer than a reasonable time in which to make the objection, and made no objection to it, then the law implies an assent on his part, and both parties are bound. He impliedly said, by not objecting, 'The account is correct, and I acquiesce in the statement.'"

It is contended that the court instructed the jury that 30 days was a reasonable time, as matter of law, and it is contended that what would be a reasonable time to object to the account was a question for the jury. This instruction may not have been strictly accurate. We do not find it necessary to hold that the retention of an account rendered for 30 days without complaint will in all cases, as matter of law, constitute such account an account stated. But in this case, if the testimony of claimant was accepted, he objected to the account promptly. If it was to be rejected, there was no evidence of any objection during the lifetime of Mr. Wilcox, a period of nearly three years, nearly one year of which time both parties were residents of the same town. This certainly affords a very strong presumption of the accuracy of the account, and, when taken in connection with the fact that no distinct error in the account was shown, should be held controlling. 1 Am. & Eng. Enc. Law (2d Ed.), p. 451, note 5, p. 452, note 1.

A book of account of deceased was admitted in evidence. It is contended that the proper foundation was not laid. It is in evidence, however, that the statement above referred to was taken from the book; that, at the time the statement was rendered, the claimant sat down with book and statement, and looked the book through. This testimony rendered the book competent as in the nature of an admission.

Examination of the record convinces us that no error was committed to the prejudice of claimant.

The judgment will be affirmed.

The other Justices concurred.

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WALKER v. CITY OF ANN ARBOR.

PUBLIC IMPROVEMENTS—BASIS OF ASSESSMENT—LAND VALUES.

Under a statute authorizing a city to levy the cost of an improvement upon adjacent property "by foot frontage, according to benefits, or by land values, as the common council shall determine," an assessment based on the value of each parcel "exclusive of improvements" is void.

Appeal from Washtenaw; Kinne, J. Submitted June 17, 1898. Decided September 27, 1898.

Bill by Bryant Walker, administrator *de bonis non* of the estate of Corydon L. Ford, deceased, against the city of Ann Arbor and William Rehfuss, county treasurer, to restrain the collection of a special assessment. From a decree dismissing the bill, complainant appeals. Reversed.

Hinton E. Spalding, for complainant.

O. E. Butterfield, City Attorney, for defendants.

MONTGOMERY, J. This bill was filed to restrain the collection of a special assessment, upon property of the estate represented by complainant, to meet the cost of a lateral sewer. The court below dismissed the bill, and complainant appeals.

It is contended by the defendants that the decree should be affirmed without reference to the irregularities in the proceedings, if any, for the reason that there is no showing of fraud, and the complainant waited, before taking any proceedings, until the work of the construction of the sewer was completed. Defendants cite, to sustain this contention, *Lundbom* v. *City of Manistee*, 93 Mich. 170; *Byram* v. *City of Detroit*, 50 Mich. 56; *Goodwillie* v. *City of Detroit*, 103 Mich. 283; *Fitzhugh* v. *City of Bay City*, 109 Mich. 581; and the curative section of the

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general tax law. We regard the rule laid down in the cases cited as salutary and just, and, if the facts in this case admitted of the application of that rule, we should apply it with great satisfaction to ourselves. For although, as will be shown later, we feel constrained to hold that the basis adopted for assessment was erroneous, and therefore jurisdictionally defective, yet we are left in doubt as to whether the complainant's *cestuis que trustent* have really suffered any substantial injury by reason of this departure. We find, however, in this case, an admission of record that the complainant had no knowledge of these proceedings until long after they were taken, and feel that we cannot, in view of this admission, ignore jurisdictional defects without doing violence to established principles.

We need discuss but one defect in the proceedings. Act No. 313, Local Acts 1895, § 2, provides:

"That all lateral and connecting sewers may be constructed at the cost and expense of the lands, tenements, and premises adjacent thereto and benefited thereby, and the cost thereof may be levied on and assessed against such lands, tenements, and premises, and collected from the owners thereof, by foot frontage, according to benefits, or by land values, as the common council shall or may determine by ordinance."

The record shows that the assessment was made on the basis of the value of each parcel, "exclusive of improvements erected thereon." While it was doubtless competent for the legislature to have authorized an assessment on a basis which would exclude the value of improvements (Cooley, Tax'n [2d Ed.], 649), the statute in question does not do so, but authorizes an assessment based upon the value of the land. Land, of course, includes the structures and improvements thereon. 2 Bl. Comm. 18. It follows that the basis adopted was unauthorized, and the assessment was jurisdictionally defective. The assessment must be set aside, but without prejudice to a reassessment, if the city shall be advised that one may be

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lawfully made. Complainant will recover costs against the city.

The other Justices concurred.

THOMAS v. CRAWFORD.

DEEDS—MENTAL INCAPACITY—GRANT TO MARRIED WOMAN—CONSIDERATION.

Complainant, an aged woman, incapable, from grief over the recent death of her husband, of understanding the nature of business transactions, gave to defendant a deed of her property, in consideration of her support during life and burial at death. The grantee was a married woman, and, while her husband participated in the negotiations, he did not obligate himself to fulfill the wife's agreement as recited in the deed. No separate instrument binding defendant was executed, and the deed did not correctly represent the bargain which defendant's own testimony showed was made. *Held*, that it should be set aside.

Appeal from Hillsdale; Peck, J., presiding. Submitted June 17, 1898. Decided September 27, 1898.

Bill by Mary Thomas against Lucinda Crawford to set aside a deed. From a decree for complainant, defendant appeals. Affirmed.

Frankhauser & Cornell, for complainant.

Mains & Cavanagh, for defendant.

MONTGOMERY, J. Bill filed to set aside a conveyance on the grounds of undue influence and mental weakness. The court below granted the relief prayed, and defendant appeals.

The complainant is a widow, and at the date of the con-

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veyance was 74 years old. The evidence shows that she, as Dr. Howard, a witness for the defendant, expressed it, "is a nervous, fidgety woman, troubled with nervous prostration at times." About a week after her husband's decease the conveyance in question was made, transferring all the real estate which the complainant had to the defendant, who is not a relative. The deed recited a consideration "of her [grantor's] support during her natural life, and her burial at death, by said second party." It was accompanied by no separate agreement. The complainant's testimony tends to show that she was, at the time this deed was made, so overcome by grief that she was incapable of understanding the transaction, and did not, in fact, understand that she had conveyed away the fee of the land. The testimony on the part of the defense indicates that the negotiations were conducted with defendant and her husband, and no satisfactory reason is shown why the husband was not obligated in some way to fulfill the engagement to care for complainant. The circuit judge was of the opinion that the deed did not protect the complainant, or correctly represent the bargain which defendant's testimony shows was made, and that the complainant did not understand the legal effect of the conveyance.

We are fully satisfied that the circuit judge reached the correct result. The case, in many of its features, is similar to *Crips* v. *Towsley*, 73 Mich. 399. The court found that defendant had been fully compensated for the care of complainant for the time she remained with her, and in this we also concur.

The decree will be affirmed, with costs.

The other Justices concurred.

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HOOKER v. BOND.[1]

1. TAXES—CONSTITUTIONAL LAW.
   Certain objections to the constitutionality of the tax law of 1893 are overruled upon the authority of *Ball* v. *Ridge Copper Co.*, *ante*, 7.

2. SAME—VALIDITY OF SALE—IRREGULARITIES.
   Under former decisions, a tax sale is not void because—
   (1) No demand was made for the payment of the tax, nor effort made to collect the same from personal property.
   (2) The land was not assessed to the owner.
   (3) No order *pro confesso* was entered.
   (4) The decree was not entered in the record book of decrees, did not contain a description of the property, and was not enrolled.

3. SAME—DECREE—TIME OF ENTRY—DIRECTORY PROVISIONS OF STATUTE.
   The provision of section 66 of the tax law of 1893, that decree shall be rendered "at least 10 days prior to the time fixed for the sale," is directory merely, a failure to observe which does not invalidate the proceeding.

4. SAME—CURATIVE PROVISIONS.
   Furthermore, such a defect is clearly within the curative provision of the act (section 99).

5. SAME—TAX RECORD—APPEAL—OBJECTIONS NOT RAISED BELOW.
   An objection that a certified copy of the decree in a tax proceeding was not annexed to the tax record, as required by section 67 of the tax law, will be disregarded on appeal, where the fact is not clearly shown by the record, and the objection does not appear to have been raised in the court below.

Appeal from Wayne; Donovan, J. Submitted June 7, 1898. Decided September 27, 1898.

Petition by Joseph Hooker against William G. Bond, Estella C. Murgittroyd, and Elanson S. Murgittroyd, for

[1] Rehearing denied June 28, 1899.

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a writ of assistance under a tax deed. From an order denying the writ, petitioner appeals. Reversed.

Charles C. Stewart, for petitioner.

Albert J. Chapman, for respondents.

GRANT, C. J. The petitioner, Joseph Hooker, presented his petition to the court below for a writ of assistance under a tax deed issued to him for delinquent taxes for the year 1892. The court denied the writ. The defendant Estella C. Murgittroyd is the owner of the original title. The validity of the proceedings under which petitioner obtained his deed is attacked for the following reasons:

1. The tax law of 1893 is unconstitutional, in that it permits landowners to be deprived of their property without due process of law.
2. The provision authorizing the issuance of the writ of assistance is void.
3. No demand for the payment of the taxes was made of the person liable to pay them.
4. The property was not assessed to the owner.
5. The collector did not seize and sell personal property to pay the tax.
6. No order *pro confesso* was ever entered.
7. No decree was made and entered of record in the proper book in the office of the register in chancery.
8. The decree does not contain a description of the property.
9. No certified copy of the decree was annexed to the tax record in the county treasurer's office.
10. The decree was not enrolled.
11. The decree was not rendered 10 days before the day fixed for the sale.

The first and second objections are disposed of by *Ball* v. *Ridge Copper Co.*, *ante*, 7. All the other objections, except the eleventh and ninth, are controlled by former decisions of this court. *Muirhead* v. *Sands*, 111 Mich. 487; *Auditor General* v. *Sparrow*, 116 Mich. 574; *Mersereau* v. *Miller*, 112 Mich. 103; *Jenkinson* v. *Auditor General*, 104 Mich. 37; *Iron Star Co.* v. *Wehse*, 117

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Mich. 487; *Hochgraef* v. *Hendrie*, 66 Mich. 560. All of these objections relate to questions over which the court in the tax proceeding had jurisdiction, and are foreclosed by that decree. The only way in which the defendant owner could have contested them was by appearing in that case, or, within the time provided, filing her petition to open the decree.

The statute clothes the court of chancery with general jurisdiction over these proceedings. It does not lose jurisdiction by the failure of any officer to perform the acts imposed upon him within the time fixed by the law, unless the taxpayer is deprived of some right, or unless the law, by negative language, prohibits the doing of the act at any other time. It should clearly appear that the act was mandatory; otherwise it will be held directory. If the taxpayer is not injured by the failure of the officer to act within the time prescribed, the failure does not render the decree and sale void. Justice COOLEY states the rule as follows:

"The fixing of an exact time for the doing of an act is only directory, where it is not fixed for the purpose of giving the party a hearing, or for any other purpose important to him." Cooley, Tax'n (2d Ed.), 289.

This rule is supported by Black, Interp. Laws, § 126; End. Interp. Stat. §§ 431, 436; 1 Blackw. Tax Titles, § 468; *People* v. *Doe*, 1 Mich. 451; *Sibley* v. *Smith*, 2 Mich. 486.

Where a statute required venires for grand jurors to be issued at least 40 days before the second Monday of September, a venire issued in less than 40 days was held valid, it being in season for service by the officer. *State* v. *Smith*, 67 Me. 328.

A similar question was before the Supreme Court of the United States, involving the tax law of the Territory of Arizona, and it was held that the object of these provisions as to time was to secure prompt action, but that the court would not lose jurisdiction to enter a decree by failing

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to act within the time prescribed. The court in that case say:

"But, inasmuch as this proceeding is one in a court of general jurisdiction, it would require very precise and prohibitory language in the statute in order to withhold from that court the ordinary functions and powers of such a tribunal, among which is not only the right, but the duty, of giving such full consideration to all questions presented as its judgment determines is necessary. No such prohibitory language is found. The purposes and intention of the act are the collection of taxes, but only of such taxes as ought to be collected, and judicial determination is invoked to determine what taxes are justly due; and that the court takes time for the examination and consideration of this question does not oust it of jurisdiction." *Maish* v. *Territory of Arizona*, 164 U. S. 599.

Moreover, this is one of the defects expressly cured by the statute that "no sale shall be held invalid on account of any irregularity, informality, omission, or want of any matter of form or substance in any proceeding that does not prejudice the property rights of the person whose property is taxed." Act No. 206, Pub. Acts 1893, § 99.

As to the ninth objection, if counsel for defendants intended to rely upon it, he should have introduced proofs to establish it. The objection is not argued by either counsel, and is not referred to in the brief of petitioner. It is made in the brief of defendants, without any reference to the record to support it. The record contains the petition of the auditor general, the decree, and report of sale. It shows that the deputy county treasurer was a witness, and that he produced the records from the office of the county treasurer, and that he read on his cross-examination from the decree, or a copy thereof, which must have been attached to the record. We find nothing to indicate that any such point was raised in the court below. It is a fair inference from the record that a copy of the decree was attached. If defendants claimed that it was void, they should have introduced it in evidence and made it a part of the record.

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We are compelled to hold that the tax deed is valid, and that the petitioner was entitled to his writ of assistance.

The learned counsel for the defendants severely attacked the officers for their carelessness and neglect of duty evidenced by the record in this case. It may be conceded that his criticism is deserved. This court has frequently spoken plainly upon this subject. But this does not excuse the taxpayer. This property had been Mr. Bond's homestead for many years. The title was in his first wife, who died some years ago, leaving one heir, the defendant Estella C. Murgittroyd. The tax was not paid, and it does not appear that any of the parties interested made any attempt to pay it.

The order of the court below will be reversed, and the court directed to issue the writ of assistance. The costs of both courts are awarded petitioner.

The other Justices concurred.

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PRENTIS v. RICHARDSON'S ESTATE.

1. MORTGAGES—FORECLOSURE—DECREE FOR DEFICIENCY—NOTICE.
   Under 2 How. Stat. § 6702, authorizing the court in foreclosure proceedings to render a personal decree against the mortgagor for a deficiency "on the coming in of the report of sale," a provision in the original decree that the mortgagor shall be personally liable for a deficiency, "if any," is insufficient; the statute contemplating a supplemental petition, with notice to the mortgagor.

2. SAME—DISCHARGE IN BANKRUPTCY—EFFECT.
   A mortgagor who receives a discharge in bankruptcy pending foreclosure proceedings is not liable to a decree for deficiency.

Error to Wayne; Donovan, J. Submitted June 17, 1898. Decided September 27, 1898.

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John F. Prentis presented a claim against the estate of David M. Richardson, deceased. The claim was disallowed by the commissioners, and claimant appealed to the circuit court. From a judgment for the estate on verdict directed by the court, claimant brings error. Affirmed.

H. G. Holmes, for appellant.

Dickinson, Thurber & Stevenson and *Charles B. Warren*, for appellee.

MOORE, J. Prior to 1877, Mr. Richardson was liable upon a note secured by a mortgage. Foreclosure proceedings were commenced in August, 1877. The subpœna was personally served. The defendant did not appear in the case, and his default was taken December 20, 1882. A decree was entered, finding the amount due on the note and mortgage to be $9,313, directing a sale of the premises, and for the deficiency, if any, it was decreed defendant Richardson should be liable personally, and execution should issue therefor. In April, 1883, the commissioner made his report of sale, and also reported the deficiency was $5,581. This report was confirmed. No further proceedings were ever had in the cause. Mr. Richardson died in September, 1889, when Mr. Prentis presented a claim against his estate for the amount of the deficiency. The claim was disallowed by the commissioners. An appeal was taken to the circuit court, where the judge directed a verdict in favor of the estate.

The record shows Mr. Richardson filed a petition in bankruptcy in December, 1877. Among his list of debts was the debt secured by the mortgage. Mr. Prentis, doubtless because he preferred not to surrender his security, did not prove his debt in the bankruptcy court. In April, 1878, Mr. Richardson was discharged in bankruptcy. On the part of the estate it is contended there are two defenses to the claim:

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1. The discharge in bankruptcy.
2. That the case is still pending in chancery, and, claimant having elected to proceed in chancery, he must pursue his remedy there until authorized to pursue it somewhere else.

As to the first of these defenses, Mr. Prentis urges it might be good against a judgment rendered prior to the discharge in bankruptcy, but that it is not good against this decree, because it was rendered after the discharge was procured. It becomes important to inquire whether this personal decree was regularly taken. The right to a personal decree for the deficiency in a foreclosure proceeding is purely statutory. It is not until the coming in of the report of sale, showing a deficiency, that the court can make a decree directing the payment by the mortgagor of any balance remaining unpaid after a sale of the premises. Section 6702, 2 How. Stat., provides:

"When a bill shall be filed for the satisfaction of a mortgage, the court shall not only have power to decree and compel the delivery of the possession of the premises to the purchaser thereof, but, on the coming in of the report of sale, the court shall have power to decree and direct the payment by the mortgagor of any balance of the mortgage debt that may remain unsatisfied after a sale of the mortgaged premises, in the cases in which such balance is recoverable at law, and for that purpose may issue the necessary executions, as in other cases, against other property of the mortgagor."

This section has frequently been construed by the courts. In *Johnson* v. *Shepard*, 35 Mich. 122, it is said:

"Under the original equitable jurisdiction, there never was any power to make a personal decree against even the mortgagor himself. His personal obligation could only be enforced in a suit at law. It was an innovation which provided that, in case there was a deficiency left after exhausting the land, the debt might be collected in the same proceedings. The first Michigan statute authorizing this remedy was the chancery act of April 23, 1833, and was confined strictly to the mortgagor himself. Section 37. Before the Revised Statutes of New York,

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there was no remedy in equity against anything but the lands mortgaged, in that State (*Dunkley* v. *Van Buren*, 3 Johns. Ch. 330), and such was the general rule (*Downing* v. *Palmateer*, 1 T. B. Mon. 66). The debt could only be collected at law. The Michigan Revised Statutes of 1838 prohibited proceeding at law and in equity at the same time, and provided that the personal claim might be pursued against the mortgagor; but in giving this power it was made to act as a supplementary process. 'On coming in of the report of sale, the court shall have power to decree and direct the payment by the mortgagor of any balance of the mortgage debt that may remain unsatisfied after a sale of the premises, in the cases in which such balance is recoverable at law, and for that purpose may issue the necessary executions, as in other cases, against other property of the mortgagor.' Rev. Stat. 1838, p. 376, § 105. * * * Our present statutes on this subject are in all respects the same with those of 1838, and those were borrowed from the laws of New York. The language is unambiguous in requiring the action which shall finally authorize the issue of an execution to be based on the confirmation of a report of deficiency. The proceeding is essentially new and supplementary, and not a mere continuation of the foreclosure. It resembles the proceeding had on the coming due of a new installment, which, although it is usually provided for in the original decree, is nevertheless as distinct a proceeding as a *scire facias* for further breaches of a bond. *Brown* v. *Thompson*, 29 Mich. 72. It was not until 1840, in *McCarthy* v. *Graham*, 8 Paige, 480, that it was settled by any reported decision that a contingent provision for personal liability could be inserted in the original decree. But it is merely contingent. It has never been held that an absolute decree can be rendered before the confirmation of the report, so as to operate as a final judgment. The practice in Michigan has generally conformed to the chancellor's decision in *McCarthy* v. *Graham*."

See, also, *Howe* v. *Lemon*, 37 Mich. 164; *Gies* v. *Green*, 42 Mich. 107; *Ransom* v. *Sutherland*, 46 Mich. 489; *McCrickett* v. *Wilson*, 50 Mich. 513; *Vaughan* v. *Black*, 63 Mich. 215; *Shields* v. *Riopelle*, Id. 458.

In *Shelden* v. *Erskine*, 78 Mich. 627, at page 633, Justice CAMPBELL said, speaking of the jurisdiction of the court to render a personal decree in such cases:

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"It is also to be exercised, and the trial of liability had, on a new hearing, after the deficiency is reported. Any decree in advance of sale made for payment is, at best, no more than declaratory, and can fix no rights."

The cases hold very clearly the attempt to take a personal decree is substantially a new proceeding, requiring personal service upon the defendant, if he can be found. In this case it was the duty of the complainant, before a personal decree could be taken against the defendant, to serve him personally with notice of the application. When the decree was taken, Mr. Richardson was in default. He could not contest the amount due on the mortgage, for there was no dispute about the amount. He could not question the lien upon the land, for the bankruptcy proceedings could not discharge the lien. He had no reason to suppose an attempt would be made to take a decree against him personally, for the statute, by its terms, did not authorize such a decree until after sale; and, as construed by the courts, the statute did not permit the taking of a personal decree without the filing of a petition, and notice to him personally. He had a right to answer the petition. While he could not dispute the amount which was due upon the mortgage, he could set up any defense which would operate to discharge his liability upon the debt. He would have had a right to show that the debt secured by the mortgage was in existence when the bankruptcy proceedings were commenced, and was provable in the bankruptcy proceedings, and his discharge in bankruptcy. The discharge would not be a defense to the mortgage, but it would be a defense to a decree against Mr. Richardson personally for deficiency. *McDougald* v. *Reid*, 5 Ala. 810; *Ewing* v. *Peck*, 17 Ala. 339; *Roberts* v. *Wood*, 38 Wis. 60; *Luning* v. *Brady*, 10 Cal. 265. Mr. Richardson was never informed it was proposed to take a personal decree against him for the deficiency. He never had an opportunity to plead his discharge in bankruptcy to an application of that character. He was entitled to such an opportunity before he could be

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cut off by the decree. *Dresser* v. *Brooks*, 3 Barb. 429; *McDonald* v. *Ingraham*, 30 Miss. 389 (64 Am. Dec. 166); *Boynton* v. *Ball*, 121 U. S. 457.

If he had been properly brought into court before the personal decree was taken, and failed to plead his discharge in bankruptcy, a different question would be presented.

The judgment is affirmed.

The other Justices concurred.

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BARNUM *v.* BARNES.

1. TAX SALES—SUFFICIENCY OF PETITION.
   A proceeding for the sale of land delinquent for taxes was found to have been based upon a petition forming a part of the tax record in the county treasurer's office, rather than upon an incomplete instrument found among the files in the office of the register in chancery.

2. SAME—DECREE—DESCRIPTION OF LANDS.
   The decree in a tax proceeding, as recorded, need not contain a description of the lands to be sold; the statute (Act No. 206, Pub. Acts 1893, § 67) contemplating that the tax record, with its entries, shall be considered a part of the decree by reference.

3. SAME—REPORT OF SALE—SUFFICIENCY.
   A county treasurer's report of a tax sale, filed with the county clerk, may refer to the tax record for the particulars of the sale, and need not set forth the same in full. *Jenison* v. *Conklin*, 114 Mich. 9, followed.

4. SAME—DECREE—TIME OF ENTRY.
   A tax sale is not void because 10 days did not intervene between the date of the decree and the date of sale. *Hooker* v. *Bond*, *ante*, 255, followed.

5. SAME—WANT OF ENROLLMENT.
   Nor is it void because the proceedings were not enrolled; 2

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How. Stat. §§ 6648, 6649, and Chancery Rule No. 24, not being applicable to such a case.

6. SAME—SALE TO STATE—VALIDITY.

Under section 70 of the tax law, it is not necessary that the sale should be kept open for 20 days before bidding off the land to the State, but it is sufficient if, on being reoffered before the close of the sale, it is found impossible to sell the land for the amount of the tax.

7. SAME—VOID SALE—REMEDIES.

Whether the validity of a tax sale can be questioned by petition in the main case after the rights of third parties have intervened, or whether the proper remedy is by bill of review, —*quære.*

Appeal from Van Buren; Buck, J. Submitted June 8, 1898. Decided September 27, 1898.

Petition by Isaac E. Barnum against Arthur E. Barnes and the auditor general to set aside a tax sale. From a decree dismissing the petition, petitioner appeals. Affirmed.

E. A. & Robert B. Crane, for petitioner.

Williams & Williams, for defendant Barnes.

James E. Chandler, for the auditor general.

HOOKER, J. The petitioner is a mortgagee of the premises in question, which were sold for the tax of 1893, under a decree of the circuit court on petition of the auditor general. The purchaser sold to Barnes, who has appeared by solicitors in this proceeding.

The petition is filed to open the decree entered in the proceedings instituted by the auditor general, under which the sale was made, and allow the petitioner to defend against the tax, upon several grounds set up in the petition. The circuit judge denied the prayer of the petition. The jurisdiction of the circuit court is attacked upon the ground that a sufficient petition was not filed by the auditor general. The decree is said to be defective, in that

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it fails to describe any lands to be sold, and because it was not made 10 days prior to the time fixed by law for the sale; also because the county treasurer never made and filed with the clerk a report of sale. It also prays that the sale be set aside because made without enrollment of the case, and because the land was sold on the first day of the sale to the State, instead of offering it from day to day for 20 days.

To prove his case, the petitioner offered in evidence the files found in the office of the register in chancery, who testified that they were all of the files that he found in his office. Among these was a petition, and counsel for the petitioner insist that this must be assumed to be the petition filed in the case, and argue, among other things, that it appears to have been filed one day after the order of publication was made. On the other hand, counsel for the auditor general asserts that this writing was a copy, and was attached to the order of publication. On consulting the original return, we find a printed order signed by the circuit judge, followed by the petition, in the same type, with a memorandum to the printer to print both, which is required by section 66 of the law. Act No. 206, Pub. Acts 1893. It would seem to follow that this cannot be considered the original petition in the case, and we need not discuss the numerous questions raised upon the assumption that it was such.

The record also contains a petition which seems to conform to section 61. It was in book form, containing a list of the lands alleged to be delinquent, and bears the evidence of filing signed by the register. It appears to have been produced from the county treasurer's office. We are satisfied of its identity and sufficiency as the original petition in the case. *Mersereau* v. *Miller*, 112 Mich. 103.

The decree is said to be void because as recorded it does not contain the descriptions of lands ordered to be sold. The statute (section 67) prescribes the form of the decree, and clearly indicates that the tax record, with its

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entries, shall be considered a part of the decree by reference, and as clearly that it was not intended that this record or any part of it should be recorded.

The report of sale was valid under the decision in the case of *Jenison* v. *Conklin*, 114 Mich. 9.

The decree was not made 10 days before the sale, but that does not preclude a sale at the usual time. The point is ruled by *Hooker* v. *Bond*, *ante*, 255.

It is also contended that the cause was not enrolled, and argued that this is necessary, under the general statute and rule, to the validity of a sale. The statute prescribes a time for the sale to take place, which precludes the application of 2 How. Stat. §§ 6648, 6649. Chancery Rule No. 24 cannot overrule the tax law, which provides when deeds may issue. *Hochgraef* v. *Hendrie*, 66 Mich. 561.

We cannot sustain the claim that the sale must be kept open 20 days before selling the land to the State. It is enough if, on being reoffered before the close of the sale, it is found impossible to sell the land for the amount of the tax during the sale.

It is contended that this is not a proper proceeding, after land has been deeded by the State, and conveyed by the purchaser to Barnes; that he is not a party to the record; and that a bill of review is the proper practice. We have not found it necessary to intimate an opinion upon that question.

The order of the circuit court in chancery is affirmed, with costs.

The other Justices concurred.

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STATE SAVINGS BANK OF DETROIT *v.* FOSTER.

BANKS AND BANKING—WHO ARE DEPOSITORS—INDIVIDUAL LIABILITY OF STOCKHOLDERS.

A bank holding certificates of deposit issued by another bank, in which it has not actually deposited the moneys thereby represented, but to which it has given credit for the amount on its own books, against which checks or drafts have been drawn, is not a depositor, within the provision of 3 How. Stat. § 3208e5, creating an individual liability of stockholders to depositors. MONTGOMERY, J., dissenting.

Appeal from Ingham; Person, J. Submitted June 8, 1898. Decided October 3, 1898.

Petition by the State Savings Bank of Detroit against Seymour Foster, receiver of the People's Savings Bank of Lansing, to compel the payment of a dividend. From an order dismissing the petition, petitioner appeals. Affirmed.

Walker & Spalding, for petitioner.

Russell C. Ostrander (*Cahill & Ostrander*, of counsel), for respondent.

LONG, J. This petition was filed to compel the receiver of the People's Savings Bank of Lansing to pay to the petitioner 12½ per cent. dividend out of the moneys in his hands as such receiver. It appears that the petitioner holds two certificates of deposit issued to it by the People's Savings Bank,—one for $10,000, dated March 24, 1894; and one for $5,000, dated June 3, 1896. These certificates are in the usual form, each stating a deposit in the People's Savings Bank by the petitioner of the amount of the certificate, payable to the order of the petitioner on the return of the certificate, properly indorsed, with interest if left

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for three months; no interest after a year from date, or for fractional parts of a month. These certificates, upon the insolvency of the People's Savings Bank, were duly proved as claims against it. An assessment having been ordered by the court upon the stockholders of the People's Savings Bank to pay depositors, this petition was filed, and claim made by petitioner that it was a depositor, and entitled to be protected as such, and to have its dividend declared the same as the other depositors.

The respondent, in answer to an order to show cause issued by the court below, after setting out the certificates of deposit in question, says, among other things:

"The moneys represented by the said certificates of deposit were not deposited in the People's Savings Bank by the petitioner at any time in the regular course of the business of said bank; nor were they ever deposited in the People's Savings Bank. The said moneys represent a sum borrowed by the People's Savings Bank of the State Savings Bank of Detroit, which sum was placed to the credit of the People's Savings Bank upon the books of the State Savings Bank of Detroit, against which credit so appearing upon said books the People's Savings Bank drew its checks or drafts as its business required."

Respondent further answers that he has declared no dividends as receiver of the People's Savings Bank excepting out of funds coming to his hands from stockholders of said bank in discharge of their individual liability as stockholders; that, when he was appointed receiver of the bank, he found from an examination of its books and papers that said bank had borrowed from time to time of other banks and bankers, and that other banks and bankers, including the petitioner in this case, had loaned to the People's Savings Bank, at its request, sums of money aggregating $96,000 and more; that in his application to the court for an order permitting this respondent to enforce the additional or statutory liability of stockholders, and in ascertaining or determining the sum of money necessary to be raised from stockholders to pay depositors, none of the banks or bankers from whom said

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People's Savings Bank had so borrowed sums aggregating $96,000 or more were treated as depositors in said bank. Respondent further returns that the petitioner holds another certificate of deposit, not mentioned in said petition, dated July 10, 1896, for $8,000; and that, all the moneys put to the credit of the People's Savings Bank having been drawn against and exhausted, the People's Savings Bank continued to draw checks and drafts upon said petitioner bank, creating in said bank an overdraft, which amounted July 10, 1896, to about $8,000; and that to balance said overdraft, and to stand for it, and to take the place of the money borrowed and represented by it, said certificate of $8,000 was issued.

Respondent therefore says that he is advised that the provisions of section 3208*e*5, 3 How. Stat., by which stockholders of every bank are liable individually for the benefit of the depositors in said bank to the amount of their stock at the par value thereof in addition to said stock, were intended to afford security to, and the word "depositors" therein means, the class of persons who, in the regular course of business, deposit or leave in a bank temporarily, and for a period determined at their option, money; that said section was not intended to protect, and the word "depositors" therein does not mean, persons from whom a bank, upon its own application, borrows money, whether loans so made are evidenced by notes, certificates of deposit, or otherwise. Respondent further says that he is advised that the certificates mentioned in said petition no more represent deposits in said People's Savings Bank, within the meaning of the banking law of Michigan, than does the certificate of July 10, 1896; but that all of them represent money loaned by the petitioner to the People's Savings Bank in the regular course of the borrowing and lending of money.

On the coming in of this answer, the court below dismissed the petition. with costs in favor of respondent. Petitioner appeals from this order.

Section 3208*e*5 provides that—

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"The stockholders of every bank shall be individually liable, equally and ratably, and not one for another, for the benefit of the depositors in said bank, to the amount of their stock at the par value thereof, in addition to the said stock. * * * Such liability may be enforced in a suit at law or in equity by any such bank in process of liquidation, or by any receiver or other officer succeeding to the legal rights of said bank." Section 46, Act No. 205, Pub. Acts 1887.

The above section forms part of the act entitled "An act to revise the laws authorizing the business of banking, and to establish a banking department for the supervision of such business." The act provides for two kinds of banks, to wit, commercial banks and savings banks; and the powers of each are fixed by the act, and each may receive deposits. It was the evident intent of the legislature that only those persons who should become depositors in the bank should have any claims upon stockholders under section 46, which makes stockholders liable to "depositors in said bank." The federal banking law now in force, which provides for banks of issue, makes stockholders liable for all engagements of the bank; and our own former banking laws, which provided for banks of issue, made stockholders liable for all such engagements; but it was only in case such banks were banks of issue that the stockholders were made so liable. Under the present banking system, the powers of banks are limited to the discounting of bills and notes, loaning money, and receiving deposits; and under this system the stockholders are liable only as provided in section 46 of the act,—that is, to the depositors.

Can this petitioner be treated as a "depositor," within the meaning of the act? We think there can be but one answer to this, under the facts appearing from the answer, which answer we must take as true. It must be conceded that a bank, as well as a private individual, may become a depositor in another bank. *Elmira Savings Bank* v. *Davis*, 73 Hun, 357. But from the answer in this case it appears that no part of the money represented by these

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certificates ever went into the People's Savings Bank. Under the arrangement, the petitioning bank took these two certificates of deposit with the understanding that the People's Savings Bank might draw its drafts upon it to the amount represented by the certificates, and it would honor the drafts, or it may have credited the People's Savings Bank in account upon its books. The certificates were simply evidences of debt, and nothing more. It might as well have held the notes of the People's Savings Bank; the transaction would have been no different. The relation of debtor and creditor exists between the bank and every depositor therein; but the legislative intent undoubtedly was to secure to depositors, as such, a right to call upon the stockholders to the amount of the stock held by each for the payment of deposits. It was not the intent of the legislature to compel the stockholders to meet the ordinary debts of the bank. Bolles, in his work on Banks and Their Depositors, says (section 1):

"While it is difficult to make an accurate definition of a deposit which shall distinguish it from every other loan, yet there are many particulars by which it may be described. A very important part of the business of banking consists in receiving, keeping, and refunding the money of persons who are called 'depositors.' 'Originally, a deposit,' says Judge Learned, 'was a thing delivered to a person for gratuitous safe-keeping, and it remained the property of the owner. The word, however, is now used to designate a certain kind of loan; for money deposited in the ordinary way becomes the property of the bank or banker, and the deposit is a debt.' When we attempt to state what kind of loans are properly called 'deposits,' we find that to some extent the original meaning of the word colors its present meaning; for there is an idea in the mind that money on deposit is lying in the bank on hand, ready to meet the demand of the owner, and that it is kept there for convenience."

It is, however, evident in the present case that this money was borrowed to enable the People's Savings Bank to keep an account at Detroit. Each actual depositor is concerned that no fictitious depositor shall participate in a

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fund to be created by an assessment upon shareholders. It is stated, and not disputed, that an assessment of 70 per cent. has been required to pay depositors, without taking into account upwards of $96,000 of like claims as this now presented.

It must be held, under the facts here shown, that the transaction between the petitioner and the People's Savings Bank was a loan by the petitioner, and not a deposit in the People's Savings Bank, within the meaning of the banking law.

The order of the court below must be affirmed, with costs in favor of respondent.

GRANT, C. J., concurred with LONG, J.

HOOKER, J. (*concurring*). The statute limits the personal liability of stockholders to an amount equal to their stock. Depositors are therefore liable to loss when the deposits exceed the amount of the capital stock of the bank. The benefit of this personal liability of the stockholders is limited to depositors, and other creditors are excluded. While a depositor is necessarily a creditor, and ordinarily the law will treat any one as a depositor whom the bank agrees to so treat by issuing its certificate of deposit, another bank which merely loans money to and is not a patron of the debtor bank, in the sense that the ordinary individual depositor is, has no right to the benefits reserved by the law to the ordinary or *bona fide* depositor. I do not wish to be understood that a bank cannot become a depositor, within this law, in another bank, under some circumstances, but that in this case it has not. I therefore concur in the opinion of my Brother LONG.

MOORE, J., concurred with HOOKER, J.

MONTGOMERY, J. (*dissenting*). I can see no good reason for denying to the claimant the rights of a depositor. It is conceded that a bank may become a depositor

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in another bank. *Elmira Savings Bank* v. *Davis*, 73 Hun, 357. There can be no question in this case that the People's Bank attempted to confer upon the claimant the rights of a depositor. It issued the certificate of deposit in the usual form. The only possible distinction between this and the ordinary case of paying money over the counter of the bank, and receiving a certificate of deposit, is that in this case, instead of going through the form of paying the money into the People's Bank, the cashier of that bank was permitted to draw on the claimant to the amount of the certificate of deposit. The funds of the People's Bank were increased by the amount of the certificate of deposit. The money was available to meet its liabilities. The case, in my view, is not different than if a draft or check had been given, drawn upon a third bank, and treated as the equivalent of cash, and the certificate of deposit given for it. It is no answer to say that this was a loan of money. So is a deposit a loan. In case of a general deposit, the money becomes the property of the bank, and the bank merely the debtor to the depositor. 1 Morse, Banks, § 186; *Cate* v. *Patterson*, 25 Mich. 191; *Beardsley* v. *Webber*, 104 Mich. 88.

Counsel for the respondent make this suggestion as to the distinction between the case presented and the case of an actual deposit, within the meaning of the banking act. Sections 3208c3 and 3208c6, 3 How. Stat., provide for a certain reserve to be kept in commercial and savings banks, and therefore counsel say:

"Will it be seriously contended that for the money received from the State Savings Bank the People's Savings Bank was obliged, within the meaning of the statute, to maintain a cash reserve? Suppose the banking commissioner finds that in a given bank the cash reserve is deficient $20,000, reference being had to actual deposits. He orders this made good, and threatens, in case of default, to close the bank. The bank borrows of the petitioner $20,000, and issues its certificate of deposit therefor. If this $20,000 is to be held to be a deposit, the reserve is still short, because every dollar of increase of deposits re-

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quires 15 cents increase of reserve; and it must therefore be held that the legal accompaniments of loans and deposits are not the same."

The case suggested by counsel illustrates, it seems to me, the danger of holding that this claimant is not a depositor. If it be held not a depositor, within the meaning of these sections, it follows that a bank might borrow of another bank the entire of its reserve, issue a certificate of deposit entitling the holder to demand immediate payment, and thus evade wholly the provisions of these two sections. It is very clear that it was not the purpose of the legislature to leave open such a possibility; and either we must hold that the word "depositor" is used in a different sense in the various sections of the statute, or we must sustain the contention of the claimant here. I see no reason for any such distinction, or for holding the contract to be anything different than the parties undertook to make.

I think the decree should be reversed, and a decree entered in favor of claimant.

WACHSMUTH *v.* SHAW ELECTRIC CRANE CO.

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1. MASTER AND SERVANT—DEFECTIVE APPLIANCES—NEGLIGENCE. Defendant provided certain of its employés with a simple tool, called a "snap-hammer," for use in riveting. The tool was made by a competent blacksmith, from proper material. The employés who used the hammer were skilled mechanics, as competent as any one to decide when it became out of repair, and were at liberty at any time to have it repaired or replaced by a new one. A chip from the hammer struck plaintiff and injured him. It did not appear that an inspection before the accident would have disclosed any defect. *Held*, that defendant was not liable.

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2. SAME—DUTY OF INSPECTION—SIMPLE TOOLS.

The duty of inspection, by an employer, of the appliances used by his employés, does not extend to the small and common tools in everyday use, of the fitness for use of which the employés using them may reasonably be supposed to be competent judges.

Error to Muskegon; Russell, J. Submitted June 9, 1898. Decided October 3, 1898.

Case by Albert J. Wachsmuth against the Shaw Electric Crane Company for personal injuries. From a judgment for plaintiff, defendant brings error. Reversed.

Bunker & Carpenter, for appellant.

Chamberlain & Cross, for appellee.

MOORE, J. Plaintiff recovered a judgment against the defendant for the loss of one of his eyes. Defendant brings the case here by writ of error.

It is the claim of the defendant that there was contributory negligence on the part of the plaintiff. That question was fully submitted to the jury, who found against the contention of defendant.

The important question is, Does the testimony tend to show any negligence on the part of the defendant? The plaintiff is an intelligent workman, upwards of 30 years old. He had been a machinist 14 or 15 years. He worked for the defendant several years, operating a machine for boring iron. Not far from his machine a gang of men were engaged in riveting together parts of a bridge for an iron crane. The process is for one man to heat the rivets. Another places beneath the rivet a solid support, capped by a piece of steel, in which there is a cup to hold in place and preserve the under head of the rivet. Another man places on the upper end of the rivet a snap-hammer, which is a hammer with a cup on its face, designed to form the upper head of the rivet. While the rivet is hot, this snap-hammer is struck by two men with sledges,

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alternately, until the riveting is completed. It is the claim of the plaintiff that he stepped away from his machine to inspect some trolley sides, upon which he would later have to do some work, and that, while so doing, a piece of steel was broken from the face of the snap-hammer, and struck him in the eye, resulting in its loss. He further claims this snap-hammer was out of repair, and should have been known to be so by the defendant, and that it was not a reasonably safe tool with which to do the work. It is the claim of the defendant that the tool was properly made by its blacksmith, from the best material; that it was not out of repair; that what occurred was an accident which could not have been foreseen. It is also claimed that, when the accident occurred, plaintiff was not engaged in necessary work, but was leaning on a pile of trolley sides, looking at the riveters, and that his negligence caused the accident. It is also claimed that, if the tool was out of repair, it was the fault of the man who was using it, and that he was a fellow-servant, and for that reason plaintiff cannot recover. Defendant asked the court to direct a verdict. This was denied. This is said to be error.

The case is very near the border line which separates those cases where a verdict should be directed from those where the case should be submitted to the jury. The difficulty does not grow out of the law itself, so much as out of the application of the law to a given case. It is now well settled the master owes to the servant the duty of using ordinary care and diligence in providing for his use sound and safe materials, and such appliances as are reasonably calculated to insure his safety. He is also bound to examine and inspect these things from time to time, and to use ordinary care and skill to discover and repair defects in them. 1 Shear. & R. Neg. § 194; 2 Thomp. Neg. 984; 14 Am. & Eng. Enc. Law, 894; 7 Am. & Eng. Enc. Law, 830; *Holden* v. *Railroad Co.*, 129 Mass. 268; Cooley, Torts, 556; *Johnson* v. *Spear*, 76 Mich. 139 (15 Am. St. Rep. 298); *Tangney* v.

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Wilson & Co., 87 Mich. 453; *Anderson* v. *Railroad Co.*, 107 Mich. 591; *McDonald* v. *Railroad Co.*, 108 Mich. 7. The record shows defendant furnished an excellent quality of steel from which to make the tool. It was made by a competent blacksmith. There is no claim that when made it was not a proper tool with which to do the work required. The men using it were skillful mechanics, as competent as any one would be to decide from an inspection of the tool whether it was a reasonably safe one to use or not. The men were not required or expected to use a tool after it became unsafe because of use or for any other cause. They were at liberty to take a defective tool at once to the blacksmith, and have it repaired or get a new one in its place. This tool was a simple one. The men using it were competent to pass upon its fitness for use. All the witnesses who saw the hammer say it was a safe one to use. The only testimony to the contrary is given by the plaintiff, who never saw the tool, but was of the opinion, judging from the appearance of the small piece of steel taken from his eye, the tool was not a proper one to use. The testimony discloses that no steel is so perfect as not to have defects which will not be disclosed by inspection. Sometimes a sliver will break off from the best of hammers. It does not appear that an inspection would have shown any defect in the hammer.

The plaintiff failed to establish a cause of action. The court should have directed a verdict in favor of defendant. *Rawley* v. *Colliau*, 90 Mich. 31; *Kehoe* v. *Allen*, 92 Mich. 464 (31 Am. St. Rep. 608); *Miller* v. *Railroad Co.*, 21 App. Div. 45; *Marsh* v. *Chickering*, 101 N. Y. 396.

Judgment is reversed, and a new trial ordered.

MONTGOMERY, J., concurred with MOORE, J.

HOOKER, J. (*concurring*). I concur in the result reached by Mr. Justice MOORE in this case upon the grounds stated by him, but I am of the opinion that the duty of periodical inspection does not extend to the small

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and common tools in everyday use, of the fitness for use of which the persons who use them may reasonably be supposed to be better judges than the master, or any person that he can employ for the purpose. The evidence shows that there were thousands of small tools in this shop, and it is improbable that there was any one man in the shop that was as expert in the use of all as the individual workmen were as to those that they respectively used. In my opinion, it is not unreasonable to say that the workmen assumed the risk of the use of such tools of this character as they chose to use. As already stated, the evidence shows that the small tools in use in this factory numbered thousands. We may assume that they consisted of innumerable articles of everyday use, such as crowbars, picks, spades, shovels, chisels, files, rasps, pliers, wrenches, braces and bits, reamers, and others that will readily suggest themselves, including hammers. It is well known that most such tools are used until they become unfit for use by wear, and that the user is not only competent to judge of their fitness, but as a rule does so. There is no evidence in the case that any concern in the country employs a person to inspect the common tools in use in the shop.

We have decisions sustaining the doctrine that a master must provide safe appliances, and that he must use reasonable diligence in keeping them in repair. In heavy or complicated machinery, and where the person called upon to use the appliance may not possess the skill to detect unfitness, or the opportunities to do so, the law may require diligence upon the part of the master; but where the appliance is a common tool, of which the man who uses it is necessarily well qualified to judge, and who when he uses it has an opportunity to know its condition, a distinction may be made, and the master may rely upon the servant to inform him of the defect, or not use the tool, if it is unsafe. This exception to the rule relied on in this case is recognized in *Miller* v. *Railroad Co.*, 21 App. Div. 45, where it was held that the master was under no obligation to inspect a push-bar, used in moving cars,

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which from use would wear, and from lapse of time decay, and which would naturally be first observed by the user. It was said in that case that "there is no duty resting on an employer to inspect during their use those common tools and appliances with which every one is conversant," and that "if a spade, a hoe, or a push-stick either wears out or becomes defective, the employer may ordinarily rely on the presumption that those using the article will first detect the defect." If, as held in the case cited, a master is not under a legal obligation to protect the servant using the tool by inspection, he is under no such obligation to the fellow-servant who suffers from the negligent use of the tool.

GRANT, C. J., and LONG, J., concurred with HOOKER, J.

AMERICAN TRUST & SAVINGS BANK OF CHICAGO *v.* FOSTER.

BANKS AND BANKING—DEPOSITORS—WHO ARE.

Case ruled by *State Savings Bank of Detroit* v. *Foster, ante,* 268.

Appeal from Ingham; Person, J. Submitted June 14, 1898. Decided October 3, 1898.

Petition by the American Trust & Savings Bank of Chicago against Seymour Foster, receiver of the People's Savings Bank of Lansing, to compel the payment of a dividend. From an order dismissing the petition, petitioner appeals. Affirmed.

Jay P. Lee and *Bartlett Wiley*, for petitioner.

Russell C. Ostrander (*Cahill & Ostrander*, of counsel), for respondent.

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LONG, J. It appears in this case that the moneys in controversy were borrowed by the People's Savings Bank from the petitioner. The petitioner is not a depositor, within the meaning of the banking law, and not entitled to claim any part of the dividend arising from the fund recovered against the stockholders. The case is governed by *State Savings Bank of Detroit* v. *Foster*, *ante*, 268.

The order below must be affirmed, with costs in favor of respondent.

GRANT, C. J., HOOKER and MOORE, JJ., concurred with LONG, J.

MONTGOMERY, J. My views are expressed in *State Savings Bank of Detroit* v. *Foster*, *ante*, 273.

COLLINS *v.* NORTH BRITISH & MERCANTILE INSURANCE CO.

FIRE INSURANCE—CLEAR-SPACE CLAUSE—EVIDENCE—ESTOPPEL.

A finding that the insured, at the time of taking out a policy, informed the agent of the insurance company of the location of his property with substantial accuracy, and that, therefore, the company is estopped from asserting a violation of the "clear-space" clause, is justified by evidence that he furnished the agent with a rough diagram approximately showing the correct situation, but which the agent incorrectly copied, and that neither party understood the diagram to be precisely accurate.

Error to Newaygo; Edwards, J. Submitted June 14, 1898. Decided October 3, 1898.

Assumpsit by David Collins against the North British

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& Mercantile Insurance Company on a policy of fire insurance. From a judgment for plaintiff, defendant brings error. Affirmed.

McGarry & Nichols (*Crane, Norris & Stevens, amici curiæ*), for appellant.

George Luton (*W. D. Fuller*, of counsel), for appellee.

MONTGOMERY, J. The plaintiff recovered a verdict on a fire-insurance policy, and defendant brings error. The defenses made below were two: (1) That the plaintiff himself burned the property; and (2) that there was a violation of the "clear-space clause," so called.

The first question was submitted to the jury, and found against the defendant. The meritorious question arises out of the following provision of the policy, viz.: "Warranted by the assured that a continuous clear space of 150 feet shall hereafter be maintained between the property hereby insured and any wood-working or manufacturing establishment." It appeared by the undisputed testimony that there was not between an unused sawmill and the lumber insured 150 feet of clear space; that the mill was situated about 250 feet in a direct line from the lumber, but that 101 feet from the lumber was a house 18x46, and that from this house to the mill was a distance of about 100 feet. Plaintiff's counsel concede that the situation was not exactly as warranted, but contend that the agent of the insurance company was fully apprised of the situation before the policy was written, and that, therefore, within the rule laid down in *Michigan Shingle Co.* v. *State Invest. & Ins. Co.*, 94 Mich. 389 (22 L. R. A. 319), and *Michigan Shingle Co.* v. *Pennsylvania Fire Ins. Co.*, 98 Mich. 611, the company is estopped from asserting the breach of warranty. The defendant's counsel, on the other hand, contend that the undisputed testimony shows that the true state of facts was not revealed to the agent.

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It would appear by the testimony of defendant's witnesses that a diagram was prepared by a Mrs. Underwood, a clerk in the office of the agent, Shaw; that this diagram showed the distance from the lumber to the mill to be 250 feet; that in a line drawn from the mill to the lumber east and west there were no buildings or barns, but a dwelling house and barn were shown farther north; that the barn was marked 95 feet from the lumber, and the distance from the barn to the mill was not given, nor were the dimensions of the barn given; so that it is not very clear from the plat whether or not there would be 150 feet of clear space between the barn and the mill, assuming the correctness of the map, but it is clear that, according to any scale adopted, there was not shown any such clear space. If the distance noted on the east and west line as 250 feet be taken as a basis, it is still uncertain, as the size of the barn is not given.

It is admitted, however, that the diagram drawn by Mrs. Underwood is inaccurate, in that it should have placed the house and shed substantially on a direct east and west line drawn from the lumber to the mill, and that there was not in fact a clear space of full 150 feet. It is contended by counsel for defendant that plaintiff's own testimony shows that this diagram was drawn from the plaintiff's directions, and fully approved by him. Mr. Collins did, it is true, testify that the preparation of the diagram was done under his supervision, but he further testified as follows:

"*Q.* What is your recollection as to the location as given by you of the barn and the dwelling house that were represented here to the left of the 250 feet?

"*A.* Well, I think this is just the same as I have looked at before. I went there, and made an application to insure the lumber that I had at Conger Station; and Mr. Shaw asked me the location and the surroundings, and I went on and described to him, as well as I could, and he didn't appear to understand. Then I took a scrap of paper, and made a rough diagram of it, upon which I represented those buildings; and I told them about these

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buildings being there, and the distances. The house I represented as a small house, and a small barn, I think I called it, that was north of it. I had marked out the location of this dwelling on this diagram.

"*Q.* How does the location that Mrs. Underwood has given upon the diagram of that house and barn correspond with what you told them, as you remember it, as to the location? Have they got it correct as you told it?

"*A.* They have got it correct with the exception of having the buildings farther north than I marked them in my diagram,—than I told them. That is my recollection.

"*Q.* You made no measurement at the time, and didn't make any diagram of the ground, and what you told them was from your recollection of the location of things there?

"*A.* I had paced; I hadn't measured with a tapeline.

"*Q.* (showing witness a map). You notice on this map a house and shed, as they call it, represented as on a direct line between the lumber and the mill?

"*A.* Yes, sir.

"*Q.* Now, you see the way they represented it on the diagram?

"*A.* Yes, sir.

"*Q.* Way to the north or left of that?

"*A.* Yes, sir.

"*Q.* You say you had paced the distance from the lumber to the house?

"*A.* Yes, sir; I made it 95 feet by pacing, and 101 feet by measurement with a tapeline afterwards; that was from the house to the lumber.

"*Q.* What I want to know is whether Mrs. Underwood is correct according to your recollection,—whether you represented the location of this house in the place she has put it on the diagram.

"*A.* I don't think I did. I knew where the house was. I think that I got the house on the diagram that I gave her, and I think you will find it, if you find it, right there at about the north end of the house, as represented here. I made the diagram by standing over near the lumber on the north part, and I looked from there, and I think I got the house a little too far north. But I don't think I got it as far north as she has got it. I am quite positive that I did not. I think she made a mistake there. * * *

"*Q.* Did you pronounce it correct after she had got through drawing it, as she testifies?

"*A.* I did not look at it at that time as it is here now, if that is the one.

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"*Q.* She testifies that that is the one. Have you any doubt of that? Have you any doubt that she testified to the fact?

"*A.* I would not want to. It don't seem possible to me that I could be so mistaken about that house being so far to one side there, but I have no doubt of her truth in the matter."

We think this testimony was sufficient to raise a question for the jury as to whether the plaintiff, at the time of taking out the insurance, informed the agent of the situation of the property with substantial accuracy. It is significant that none of the parties understood that this diagram was precisely accurate. If, as the plaintiff states, the diagram drawn by him showed the house and barn farther south, it was not his fault that the clerk made the mistake in putting on paper the results of the information given her.

The other questions raised have had consideration, and no error is discovered.

The judgment will be affirmed.

The other Justices concurred.

STAFFORD v. CRAWFORD.

1. FINDINGS BY COURT—WHEN MADE—FINAL JUDGMENT.
   Findings of fact and law are not authorized after final judgment, unless such judgment is vacated for the purpose on proper showing.

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2. SAME—REVIEW ON APPEAL.
   Failure to file exceptions to findings precludes the raising of any question on appeal save that of whether the findings support the judgment.

Error to Huron; Beach, J. Submitted June 15, 1898. Decided October 3, 1898.

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William R. Stafford appealed from an order of the probate court disallowing certain items in his account as executor of the last will and testament of Mabel Crawford, deceased. The account was allowed in the circuit, and Clay Crawford, co-executor, brings error. Affirmed.

W. T. Bope (*McDonell & Hall*, of counsel), for appellant.

Bacon & Palmer, for appellee.

MONTGOMERY, J. The circuit court, on an appeal from the probate court, entered a judgment allowing the account of William R. Stafford as executor. The proceeding is before us on error. Insuperable objections to a consideration of the points made confront us. The record shows that no request for a finding of facts or law was presented before judgment. After judgment was entered, a finding was made on request of the appellant, but no exception to this finding was filed. Circuit Court Rule No. 26 has been ignored. In *Brown* v. *Haak*, 48 Mich. 229, it was held that the request for findings must precede the entry of judgment. Indeed, the language of the rule is plain and unambiguous. We held in *Coit* v. *Judge of Superior Court*, McGrath, Mand. Cas. No. 704, that a trial court may vacate a judgment to afford opportunity for presenting a request for findings in a proper case, but no showing authorizing such action was made or attempted in this case. The appellee objected to the court's filing findings, and, as the findings were not authorized while final judgment stood, we think the appellee was not bound to propose amendments, and was justified in ignoring the findings. The failure to file exceptions to the findings would also, even if the findings were regular, preclude us from examining any other question than that of whether the findings support the judgment. *Weist* v. *Morlock*, 116 Mich. 606.

The judgment will be affirmed, with costs.

The other Justices concurred.

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PEOPLE v. ENGLE.

CRIMINAL LAW—VERDICT—INSTRUCTIONS URGING AGREEMENT.

Upon a prosecution for violation of the local option law, the testimony was in direct conflict. After being out all night, the jury announced that they were unable to agree, but were sent back by the court, with the direction that each should try to be persuaded, instead of trying to persuade his fellows. The jury, within an hour, returned a verdict of guilty, with the recommendation that the court fix the penalty as light as the law would allow. *Held*, that the direction was calculated to convey to the individual juror the impression that the verdict need not be the result of his own convictions, and was therefore erroneous.

Exceptions before judgment from Van Buren; Buck, J. Submitted June 16, 1898. Decided October 3, 1898.

M. A. Engle was convicted of violating the local option law. Reversed.

Benjamin F. Heckert, for appellant.

James E. Chandler, Prosecuting Attorney, for the people.

LONG, J. In July, 1897, the local option law was in force in Van Buren county. Respondent was a registered pharmacist, and was charged in the information with having sold, furnished, and delivered, on July 23, 1897, to one Charles T. Benham, one bottle of beer, to be used as a beverage. The pharmacy was owned and kept by W. A. Engle, and the respondent was in his employ as a clerk. It appears that Charles T. Benham and F. S. Persing were employed by the prosecuting attorney and sheriff of the county to look up liquor cases in that county, and were paid $5 a day each for their services. Benham went by the name of F. C. Hart, and Persing by the

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name of F. J. Freeman, and so registered at their different stopping places in the county. On the day the beer is alleged to have been sold, they arrived in Hartford, Van Buren county, about noon, and stopped at an hotel. Benham testified that, at about 9 o'clock in the evening, he and Persing went into the Engle store, and found the respondent there, and asked him for a bottle of export beer; that respondent said he would get it for them; that—

"He went down cellar, and came up with a bottle. We stood at the head of the stairs leading down cellar. * * * The respondent brought back a bottle of lager beer, and asked if he should open the bottle. I told him, 'Yes,' and he drew the cork; and he says, 'Boys, you will have to step to the door to drink it.' And we stepped just outside of the door, on the back steps, and drank the beer, came back, and he was standing on the stairs. He said: 'Set the bottle right down there; it will be all right.' I paid him 20 cents, and went out. We didn't inform Mr. Engle the purpose we wanted to put the beer to. He didn't ask us. He said nothing about it."

Mr. Persing was called, and testified to the same transaction having taken place at the time given by Benham. They both testified that they did not go into the store except on that occasion, and were not there in the afternoon. The people then rested.

The respondent testified that he was not in the store at the time mentioned, but that he went from it about 8 o'clock; that he sold Benham no beer on that night, but that about 4 o'clock in the afternoon the parties came in, and asked him for some beer; that Mr. Persing, who called himself Freeman, asked for it. Respondent then testified:

"Freeman is the name he gave. He said he would like to get a couple of bottles. I asked him if he wanted it for medicine, and he said he did. I asked him his name, and he gave the name of F. J. Freeman, and I put it on the book, and he took the beer, and went out. This was about 4 o'clock in the afternoon. * * *"

Mr. Woolsey, a half brother of the respondent, was

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also a clerk in the store. He testified that he was in the store that night, and that respondent went out of the store at 8 o'clock; that no such transaction took place that night as testified to by Benham and Persing. Milo Wolcott testified that he saw Benham and Persing come out of the store about 4 o'clock that afternoon, and saw them all the evening at the hotel, which was his headquarters; that, when he saw them come out of the store, one of them had a long package done up in a piece of paper. It was the theory of the respondent that this package was the two bottles of beer just purchased from him.

The business of druggist is a lawful business, in which the legislature has recognized the necessity for the sale of all kinds of liquors to adult persons, at all times, day or night, even where the local option law is in force. The restriction placed upon the sale is that it shall be sold only for medicinal, chemical, scientific, mechanical, or sacramental purposes. The statute further provides that it shall not be sold to any person as a beverage, to be drunk on the premises; and that the druggist shall keep a blank book in which shall be recorded the names of all persons applying for such liquor for any of these lawful purposes, the date of each sale, the amount and kind of liquor sold to each person, and the purpose to which the same is to be applied, as stated by the purchaser. 3 How. Stat. § 2283c6. Respondent claimed to have fully complied with this statute.

The question in the case is whether the sale was made at 9 o'clock in the evening, and under the circumstances claimed by the people, or at 4 o'clock in the afternoon of the day, under the circumstances testified to by respondent. If the sale was made as claimed by the two witnesses for the people, there was a violation of the law; if sold under the circumstances stated by respondent, there was no violation of the law, and the respondent was wrongfully convicted.

There is but one question in the case which we deem

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important to discuss. It appears that the jury had been out all night, and, returning into court in the morning, they were asked if they had agreed upon their verdict, and, answering in the negative, the court asked:

"Do you think you have exhausted every reasonable effort to agree?

"*The Foreman:* Yes, sir; we have been over the testimony several times.

"*The Court:* I was very sorry, gentlemen, that you were obliged to remain out all night with this case. The work of a jury is hard enough if it only works when court is in session, without having to be out all night; but the interests of both the people and the respondent are important in this case, and it is very important that you should, if possible under the testimony, agree upon a verdict. Now, I have no doubt that you have done just as your foreman says,—gone over the testimony very carefully and conscientiously, and endeavored to agree upon a verdict, so far as you have been able to; but perhaps, on further reflection, you may be able to do so. I certainly hope so. Now, I make this suggestion: I have no doubt that each side has used all the powers of persuasion, that of the individual jurors, to convince his fellow jurors of the case as it looks to him. Now, suppose you go out and try the reverse, and let each of you try as hard as you can to be persuaded, instead of trying to persuade the others. Try and persuade yourselves, those who do not agree with their fellow jurors, and see if, looking over the testimony carefully and listening to all the arguments that those who do not agree with you may use, you cannot come to the same verdict. In view, as I have said, of the importance of the verdict in this case, I do not feel like discharging you at this time. It is now early in the morning. You have had your breakfast. Make yourselves as easy and comfortable as you can, and think the matter over carefully. Divest yourselves of all sort of preconceived opinions about the case on either side up to this time. Start right in now just as if you had first gone out, and see what you can do. You may again retire, gentlemen."

Within an hour after this charge, the jury returned a verdict of guilty, but with the recommendation that the court fix the punishment or fine as light as the law would allow in such cases.

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Counsel for the people contends that the instruction comes within the rule laid down in *Com.* v. *Tuey*, 8 Cush. 1, where the trial court, among other things, charged the jury:

"But in conferring together you ought to pay proper respect to each other's opinions, and listen—with a disposition to be convinced—to each other's arguments; and, on the one hand, if much the larger number of your panel are for a conviction, a dissenting juror should consider whether a doubt in his own mind is a reasonable one which makes no impression upon the minds of so many men equally honest, equally intelligent, with himself, and who have heard the same evidence with the same attention, with equal desire to arrive at the truth, and under the sanction of the same oath; and, on the other hand, if a majority are for acquittal, the minority ought seriously to ask themselves whether they may not reasonably, and ought not to, doubt the correctness of a judgment which is not concurred in by most of those with whom they are associated, and distrust the weight or sufficiency of that evidence which fails to carry conviction to the minds of their fellows."

That court before that, however, had stated in the same connection to the jury:

"Although the verdict to which a juror agrees must, of course, be his own verdict, the result of his own convictions, and not a mere acquiescence in the conclusion of his fellows, yet, in order to bring 12 minds to a unanimous result, you must examine the questions submitted to you with candor, and with a proper regard and deference to the opinions of each other."

That charge was approved by the supreme court of Massachusetts.

In the present case, however, the jury were not instructed that the verdict to which they agreed should be and must be each individual juror's own verdict, the result of his own convictions, and not a mere acquiescence in the conclusion of his fellows; but, on the contrary, they were instructed just the reverse,—that they must each try to be persuaded. We think the court was in error in this

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instruction, and that its substance had a tendency to make the jurors feel that they must give way their honest convictions upon the merits, and agree with the majority, though they had a reasonable doubt of the guilt of the respondent. This may have been what the minority did, and in consequence of which the foreman, in announcing the conclusion, recommended that the court should be lenient in passing sentence. For this reason the verdict must be set aside, and a new trial granted.

We have examined the other questions raised, and find no error in them.

The other Justices concurred.

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PEOPLE *v.* SWARTZ.

1. CRIMINAL LAW—CHANGE OF VENUE—DENIAL.
   The denial of a change of venue, asked because of alleged local prejudice, is no ground for a reversal of a conviction, where the jury was obtained without the respondent having exhausted his peremptory challenges, and there is no evidence that the jury were improperly influenced.

2. SAME—NEW TRIAL—STATUTORY LIMITATIONS.
   Respondent, having been convicted at the May term of court, applied for a new trial, which was denied at the October term. In July following he made a motion for a rehearing of the application, on the ground of newly-discovered evidence. *Held*, that the motion was, in effect, for a new trial, and under 2 How. Stat. § 9576, authorizing the granting of new trials in criminal cases "at the same term" at which the trial is had, "or at the next term thereafter," came too late.

3. TRIAL—WITNESSES—ERROR CURED.
   Error in sustaining an objection to a question is cured by subsequently permitting an answer.

4. HOMICIDE — EVIDENCE — DECLARATIONS OF ACCUSED — RELEVANCY.
   Evidence on a trial for murder, that the accused, shortly after

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the crime, voluntarily stated that, while attending a medical college, he had strapped a corpse to a buggy seat, after tying its hands and feet together, and had driven with it some distance, is admissible, where the prosecution claims that the condition of the deceased's body when found indicated that it had been so treated.

5. CRIMINAL LAW—REMARKS OF PROSECUTOR—REPORTER'S MINUTES—CONTRADICTION.

Statements by the prosecuting attorney in his argument, although improper as shown by the reporter's minutes, will not be so considered, where affidavits as to the exact language used, made by the attorney and several of the jurors, indicate an entirely proper statement,—especially where no objection was made to the language used until the reporter's minutes were written out.

6. SAME.

Improper statements by the prosecuting attorney are not ground for reversal where the court peremptorily checked the attorney, and instructed the jury to disregard the improper remarks.

7. SAME—REASONABLE DOUBT—DEFINITION.

An instruction defining a reasonable doubt as a fair doubt, growing out of the testimony, based on reason and common sense, and not an imaginary, captious, or possible one, and as "such a doubt as may leave your minds, after a careful examination of all the evidence in the case, in that condition that you cannot say that you have an abiding conviction to a moral certainty, from the evidence in the case, of the truth of the charge," is not misleading.

8. SAME—REQUESTED INSTRUCTIONS—GENERAL CHARGE.

The action of the court in refusing to give certain instructions in the form requested by respondent, embodying instead, in the general charge, the substance of all that were material and proper, is to be commended, rather than condemned as error.

Error to St. Joseph; Yaple, J. Submitted June 16, 1898. Decided October 3, 1898.

Adelbert D. Swartz was convicted of murder in the first degree, and sentenced to imprisonment for life in the state prison at Jackson. Affirmed.

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H. P. Stewart and *Howard, Roos & Howard*, for appellant.

Fred A. Maynard, Attorney General, and *George H. Arnold*, Prosecuting Attorney (*B. E. & L. F. Andrews*, of counsel), for the people.

MOORE, J. On the morning of the 13th of October, 1894, the dead body of Willard N. Johnson, with four bullet holes in the heart, was found in the St. Joseph river, near the Farrand bridge, in the county of St. Joseph. The respondent is convicted of his murder, and has been sentenced to state's prison for life. He brings the case here by writ of error.

The record contains 75 assignments of error. It is not necessary to discuss many of them, though they have all had careful examination. Before the trial there was an application for a change of venue, upon the ground that respondent could not have a fair trial in St. Joseph county, because of the prejudice against him. Affidavits and counter affidavits were filed. The court denied the application. The record shows that a jury was obtained without serious difficulty, and before respondent had exhausted his peremptory challenges. After the respondent was convicted, a motion was made for a new trial, and it was then averred that the court erred in denying the application for a change of venue, and it was also said respondent did not have a fair trial, on account of the public feeling, which manifested itself during the trial both in and out of the court-room, and because of the argument made by the prosecuting attorney. The statements contained in this application were supported by some affidavits, and were denied by many counter affidavits. The court denied the application for a new trial, and found that there was no serious difficulty in getting a jury, and that there was no evidence that the jury were improperly influenced within or without the court-room. In his disposition of the petition, he found:

"Whenever recess or adjournment was taken, the peo-

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ple in the court-room were required to remain in their places until the jury had retired. While the jury were deliberating upon their verdict, officers of the court were stationed upon the ground outside of the court-house, to guard against any possible attempt on the part of any person to approach, influence, communicate, or interfere with the jury in any manner; and I find that the officers performed their duties faithfully, and that nothing transpired which could have prejudiced the respondent. There was no attempt during the progress of the trial, so far as I am able to ascertain, to intimidate or interfere with the witnesses for respondent. There was no manifestation of any such disposition in the court-room. The claim of counsel for respondent in this respect is not sustained. I find that the circumstances surrounding the trial support the integrity and purity of the verdict."

There is nothing in the showing made in this court which leads us to doubt the correctness of the conclusions of the trial court. There is no such showing as leads us to the conclusion that the court erred in refusing a change of venue. 4 Am. & Eng. Enc. Law, 818.

The case was tried at the May term of court, in 1895. The application for a new trial was denied at the October term of court. In July, 1896, a motion was made to have the application for a new trial reheard, upon the ground of newly-discovered evidence. Affidavits were filed in support of the motion, and counter affidavits were filed. The motion was overruled. This was practically an application for a new trial, made more than a year after the case was tried. The statute contemplates applications for a new trial shall be made speedily. 2 How. Stat. § 9576; *People* v. *Marble*, 38 Mich. 309; *Frazer* v. *Judge of Recorder's Court*, 112 Mich. 469. But, even should it be conceded this application was made in time, no such showing was made as to indicate a wrong use of the discretion vested in the trial court in refusing a new trial.

Many assignments of error relate to the admission of testimony. One of the expert witnesses was asked, if a man having received wounds through the right side of his heart had hold of a rod or something with the left hand

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to steady himself, would it have a tendency to keep the body in an upright position longer than if he had not? An objection was made to the question, which objection was sustained. Counsel were afterwards told they might take an answer to the question. They now assign error. We do not deem it necessary to discuss the matter further than to say, if error was committed in sustaining the objection, it was afterwards cured by permitting an answer to the question. *Stanton* v. *Estey Manfg. Co.*, 90 Mich. 12.

Some testimony was permitted to be given, when counsel for respondent objected that it was immaterial, which testimony was afterwards stricken out by the court. It is now urged that, as the court struck out the testimony, it must have been immaterial or incompetent, and, having been allowed to go to the jury, it worked prejudice to the respondent. Except as we shall discuss the testimony more in detail, it may be said of this testimony it was not of a character that could do any harm to the respondent, and might well have been left in the case. It was evidently stricken out of the case by the trial judge because of a desire to leave nothing in the case which could be possibly prejudicial to the respondent. When the court struck out this testimony, he cautioned the jury they must not consider it at all.

After the body was found, a coroner's inquest was held. The respondent was present, and talked a good deal about Mr. Johnson, and the manner of his killing, and about offering a reward for the murderers, and about his relations with Mr. Johnson. Witnesses were asked about this conversation, and related it in detail. A witness was allowed to state as follows:

"We were talking about folks feeling timid around where corpses were. He said they didn't affect him. Of course, he was a little bit affected being around Johnson's, the way he was killed. He said he had been in a room, and moved around and hit them, when he was alone. He told about going out about 12 miles. He said an old

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man had been turned over to the school, and he said they went out, and got him, and took and tied his hands together and his feet together, and set him up in a buggy strapped to the seat, and they put a hat on his head, and everybody they met thought he was a living man sitting in there. Dell Swartz is studying for a physician. He showed us a letter that he got from the professor of the college, but I don't remember where."

It is said this was a serious error. It was the theory of the people that respondent had lived with the deceased, who was his brother-in-law, for some time; that shortly before the murder, in the absence of Mr. Johnson, his wife, who was an invalid and a sister of the respondent, took their little girl, and, with the respondent, left her husband's house, and went to live with her father, 20 miles or more from the home of Mr. Johnson. It is claimed Mr. Johnson went to see his wife, and, when he arrived at her father's, the farm bell was rung for the respondent, before Mrs. Johnson would see her husband. It is said Mr. Johnson was not allowed to see his little girl; that there was ill feeling between the respondent and Mr. Johnson; that, after Johnson left the home of respondent's father, he stopped at the house of Mr. Tunison; that the respondent, assisted by some one else, waited for him near a piece of woods, when Mr. Johnson was shot dead; that his body, horse, and cart were taken to the woods until people were not likely to frequent the roads, when his body, seated in a buggy, was conveyed several miles, to the Farrand bridge, where it was thrown into the river, and a number of shots fired upon the bridge, and that at the same time a revolver was thrown into the river, for the purpose of conveying the impression that Mr. Johnson had committed suicide. It is the claim of the people that *rigor mortis* had set in when the body was thrown into the river; that the legs were drawn up, and in the position they would be if the body had stiffened while seated in the seat of a buggy, strapped to the back of the seat; that the arms were also rigid, and partly drawn back, one of the hands being

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nearly as high as the head. It is claimed, after the body was thrown into the river, the respondent and another man took the horse and cart belonging to Mr. Johnson to the home of Mr. Johnson, a number of miles away, leaving them in the barnyard, there being in the cart Mr. Johnson's hat, overcoat, and rubber coat; that the inmates of the house were awakened by the horse. It is claimed that, after the horse and cart were left at Mr. Johnson's, the respondent returned to his home. It is the claim of the people that the respondent drove a gray horse belonging to Dr. Peas, and arrived home very early in the morning. The people gave testimony tending to support their theory of the case. The respondent denied having any knowledge of what occurred to Mr. Johnson after he left the house of Mr. Swartz; and it was the theory of the defense that Mr. Johnson had committed suicide, but that, if he was murdered, it was done without the knowledge of the respondent, and by some one else. Testimony was given showing respondent did not leave his father's house that night. In view of the theory of the people and the testimony in support of it, the testimony in relation to the finding of the body, its position in the stream, the heels dragging on the bed of the stream, the body being partially erect, the head and hands nearly out of the water, the rigid condition of the legs and arms, the fact that this conversation occurred soon after the tragedy, that it was a voluntary talk in connection with the circumstances attending the death of Mr. Johnson, we think it was relevant evidence, and it was for the jury to decide what effect should be given it in connection with all other testimony. Bradner, Ev. (2d Ed.) 5, 6.

We do not deem it necessary to discuss the other assignments of error in relation to the admission of testimony.

Exceptions were taken to the argument of the prosecuting attorney. It is said he misstated the testimony to the jury. As to some of the instances cited by counsel, an inspection of the record shows the statements were fully justified by the evidence. In another instance there was

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a disagreement between counsel as to what the record contained, and the court caused the stenographer's minutes to be read to the jury. The judge cautioned the jury against relying upon anything except the testimony in relation to questions of fact.

It is claimed the prosecuting attorney expressed his opinion of the respondent in such a way as to prejudice the jury, and to bring the case within *People* v. *Montague*, 71 Mich. 447; *People* v. *Evans*, 72 Mich. 367; *People* v. *Lange*, 90 Mich. 454; *People* v. *Kahler*, 93 Mich. 625. The prosecuting attorney was commenting upon the testimony of a witness, and it is claimed used the following language: "That is either true or false, and, if it is false, John Derhammer is no better than the man we are trying here today." The attention of the court was not called to this language until the motion for a new trial was made. The reporter's minutes show the language as quoted. The prosecuting attorney and 11 of the jurors made affidavit that the language quoted was not all that was said, but the words "if he is guilty" were used by the prosecuting attorney. The circuit judge, in disposing of the question, finds that the arrangements of the court-room and the relative position of the parties will readily account for the failure to correctly report the remarks of counsel. The fact that no objection was made until the minutes of the reporter were written out is strongly corroborative of the accuracy of the recollection of the prosecuting attorney and the jurors.

Complaint is made of the use made by the prosecuting attorney of the case of *Com.* v. *Webster*, 5 Cush. (Mass.) 295 (52 Am. Dec. 711); *Id.* 386. The record shows that the counsel for respondent called the attention of the jury to this case, and used it in behalf of his client, and that the prosecuting officer was replying to his argument. As soon as the objection was made to the argument, the court stopped it, and told the jury in very explicit terms that they must not be influenced by the statement of counsel in regard to the *Webster Case*. If what

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was said by the counsel was improper,—and, in view of the way the question came up, I am not prepared to say it was,—the court at once prevented any mischief being done by instructing the jury not to regard the remarks made. The zeal of counsel in an important and closely contested criminal case is apt to lead them to extreme expressions; but where the court directs and controls the trial, and promptly checks the attorney when he attempts to go further than his duty calls him, and properly instructs the jury to disregard the improper remarks, the verdict should not be set aside because, before this is done, an improper sentence has dropped from the lips of counsel. *People* v. *Hess*, 85 Mich. 128; *People* v. *Pope*, 108 Mich. 361.

Exception is taken to the instruction of the court as to what constitutes a reasonable doubt. Counsel say:

"The difficulty grows out of the fact that the term 'reasonable doubt' is exceedingly difficult to define, except in a negative way. There is no better positive definition than the expression itself, and when you commence to explain to a jury what a reasonable doubt is, and what constitutes a reasonable doubt, and what does not constitute a reasonable doubt, you are liable to leave in their minds a 'reasonable doubt' as to what a reasonable doubt is."

The charge of the court upon that subject is as follows:

"A reasonable doubt, gentlemen, is a fair doubt, growing out of the testimony of the case. It is not a mere imaginary, captious, or possible doubt. There are very few things in this world outside of mathematics, gentlemen, that are capable of demonstration. But it is a fair doubt, based upon reason and common sense. It is such a doubt as may leave your minds, after a careful examination of all the evidence in the case, in that condition that you cannot say that you have an abiding conviction to a moral certainty, from the evidence in the case, of the truth of the charge here made against the respondent. Now, apply this rule to this case and to this respondent. If you should become satisfied from the evidence that he is guilty of murder, so that you can say: 'There may be a

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possible doubt, but there is no reasonable doubt; I am morally satisfied and certain from the evidence in the case that the respondent is guilty,'—then you should say so by your verdict."

This charge is in entire harmony with the decisions of this court. *People* v. *Finley*, 38 Mich. 482; *McGuire* v. *People*, 44 Mich. 286 (38 Am. Rep. 265); *People* v. *Cox*, 70 Mich. 257; *People* v. *Flynn*, 96 Mich. 276.

Error is assigned because the court refused to give certain of the requests to charge presented by counsel for respondent. Instead of reading these requests, the court gave the substance of all of them which were material and proper to be given, in a general charge of exceptional clearness and fairness, in which all of the rights of the respondent were carefully guarded. Such a course, instead of being error, is to be commended. *Fraser* v. *Jennison*, 42 Mich. 206; *Keables* v. *Christie*, 47 Mich. 594; *People* v. *Sligh*, 48 Mich. 54; *Miller* v. *Sharp*, 65 Mich. 21.

The court was asked to charge the jury that the evidence in the case was not sufficient to warrant a conviction. A long and able argument is made to convince us that this request ought to have been given. We have already sufficiently alluded to the different theories held by the people and by the respondent. If the jury believed the testimony offered by the people, in connection with the circumstances presented, it was not an unfair inference from all the proofs offered by the people that Mr. Johnson was murdered, and by the respondent. On the other hand, if the testimony offered on the part of the respondent is believed, he should have been acquitted. The case was a proper one to submit to the jury.

We discover no error in the case. The judgment is affirmed.

The other Justices concurred.

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FRETZ *v.* MURRAY.

1. ACTION ON NOTE—USURY—APPLICATION OF PAYMENTS—FINDINGS OF COURT.

Where in an action upon a note drawn at usurious interest, the cause being tried before the court without a jury, the findings show simply that the defendant paid to the plaintiff, prior to the commencement of suit, sums to a stated amount, it will be presumed that the payments were general.

2. SAME.

A general payment by the maker upon a promissory note, the interest on which is void as in excess of the rate prescribed by Act No. 156, Pub. Acts 1891, must be applied in reduction of the principal.

Case made from Kent; Adsit, J. Submitted June 17, 1898. Decided October 3, 1898.

Assumpsit by Harriet C. Fretz against Bernard Murray on a promissory note. Plaintiff had judgment for less than the amount claimed, and she assigns error. Affirmed.

Cutcheon & Swarthout, for appellant.

G. A. Wolf, for appellee.

LONG, J. This action is brought upon a promissory note of $400, bearing interest at 10 per cent. The note is dated September 26, 1893, and due in three years after date. The cause was tried before the court without a jury, and the court found the following facts and law:

"This action is brought upon a promissory note, of which the following is a copy: * * * This note was given to secure a loan of $400 obtained by Mr. Murray from the plaintiff. Mr. Murray paid to the plaintiff, prior to the commencement of this suit, sums amounting to $135. * * * The defense relied upon is usury, and

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defendant insists that under Act No. 156, Pub. Acts 1891, the entire interest is forfeited, and that the court must apply all payments made on the principal.

"(1) The act of 1891 makes a radical change in the policy of our law. The borrower now 'shall not be compelled to pay any interest,' and 'the court shall declare the interest to be void.' Those States having similar laws to our present statute appear to have followed the construction contended for by the defendant.

"(2) In accordance with these principles, I am compelled to apply the $135 upon the principal sum, and render judgment for only $265."

Judgment was entered for that amount. Plaintiff's counsel duly filed exceptions to the findings of law made by the court, but took no exceptions to the findings of fact. Plaintiff assigns error.

Section 1, Act No. 156, Pub. Acts 1891, provides that parties may stipulate in writing for the payment of interest not exceeding the rate of 8 per cent. per annum. It is provided by section 2:

"No bond, bill, note, contract, or assurance made or given for or upon a consideration or contract whereby or whereon a greater rate of interest has been, directly or indirectly, reserved, taken, or received than is allowed by law, shall be thereby rendered void; but in any action brought by any person on such usurious contract or assurance, except as is provided in the following section, if it shall appear that a greater rate of interest has been, directly or indirectly, reserved, taken, or received than is allowed by law, the defendant shall not be compelled to pay any interest thereon."

By section 3 it is provided:

"Whenever it shall satisfactorily appear by the admission of the defendant, or by proof, that any bond, bill, note, assurance, pledge, conveyance, contract, security, or any evidence of debt has been taken or received in violation of this act, the court shall declare the interest thereon to be void."

The contention of plaintiff's counsel is that the action was not brought to compel the defendant to pay any interest; that no interest was demanded or sued for; and

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that, in the absence of a statute providing therefor, voluntary payments of usury cannot be set off in an action on the debt.

The Revised Statutes of 1838 (page 160) fixed the rate of interest at 7 per cent., but permitted 10 per cent. if stipulated in writing. A contract reserving a greater rate was not thereby made void, but in an action thereon the defendant was to recover costs. It was further provided that "the plaintiff shall forfeit threefold the amount of the usurious interest so reserved, taken, or received, and shall have judgment for the balance only which shall remain due after deducting from the principal and lawful interest the said threefold amount." This clause was repealed by Act No. 47, Laws 1843, and the following clause substituted: "The plaintiff shall have judgment for the principal and legal interest only." The statute of 1838 also provided, by section 7, that "whenever a greater rate of interest than is allowed by law shall have been paid, the party paying the same may recover back threefold the amount of the excess of such interest so paid, by action of debt: *Provided*, that such action shall be prosecuted within one year from the time when such interest shall have been paid." This section was also repealed by Act No. 47, Laws 1843. There was no change in the law upon this subject until Act No. 138, Pub. Acts 1887, was passed, which provided a rate of 6 per cent., with privilege to contract in writing for not more than 10 per cent. But in this act no forfeiture was declared. The statute under consideration declares no forfeiture, but expressly provides that the note, bond, etc., shall not be rendered void by reason of a greater interest charge being made. It is, however, further expressly provided that, in any action brought on such usurious contract, if it shall appear that a greater rate of interest has been reserved, etc., "the defendant shall not be compelled to pay any interest thereon." It does appear that a greater rate of interest than allowed by law has been reserved in this contract. The only question, then, for consideration, is whether, by

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a judgment for the whole amount of the principal, the defendant would be "compelled to pay any interest thereon."

The plaintiff having taken no exceptions to the findings of fact, and no request for further findings having been made, we cannot refer to the testimony in the case, but must be governed by the facts found by the trial court. The court failed to find whether the payments made upon the note were for interest charges or were made generally upon the note. The burden was on the plaintiff to show the payments were made on the interest. The court below did not so find, and we must, therefore, presume that the payments were general. The rule is that, so long as any part of the principal debt remains unpaid, the debtor has the right to have all payments previously made applied by the court as so much paid on the debt itself. 27 Am. & Eng. Enc. Law, 963, and cases there cited. The statute of Illinois is substantially the same as ours. It declares all interest forfeited on usurious contracts. This statute was before the United States Supreme Court in *Fowler* v. *Equitable Trust Co.*, 141 U. S. 384. It appeared that the borrower paid the agent of the lender a commission of $100, which was held to make the note usurious. The statute provided that, if a higher rate of interest than 10 per cent. was taken, the lender should forfeit the entire interest, and could recover the principal sum only. Fowler, the appellant, contended that all payments of interest must be applied on the principal. The court, in passing on this question, said:

"The result is that the recovery must be limited to the principal sum due the company. The statute declares, in respect to an usurious contract, that the lender shall only recover the principal sum due; in other words, that judgment shall be rendered only for that sum. But what are the rules for the guidance of the court in determining the principal sum due? In Illinois, it is settled that a party making application to a court of equity for affirmative relief against an usurious contract is entitled to such relief

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only upon the condition that he shall pay or offer to pay the principal sum with legal interest. * * * It is equally well settled there that one who has voluntarily paid usurious interest cannot recover it back in an action at law. * * * But it is the established doctrine of the supreme court of that State that these rules have no application where the transaction has not been settled, and the lender sues to recover a balance due on the principal sum. In such a case, the borrower, being sued, may have all payments made by him on account of interest applied in diminution of such part of the principal as remains unpaid. * * * Such is the uniform construction of the statute which, in the case of usury in a loan, forfeits the whole of the interest contracted to be received, and permits a recovery only for the principal sum due. As there is no interest really due if the transaction be usurious, the right to recover interest being forfeited at the moment the contract of loan is consummated, whatever the borrower pays on account of the loan must go as credit on the principal sum; otherwise the usurer would get the benefit of his illegal contract, and the statute be rendered inoperative."

Under the North Carolina statute, the entire interest is forfeited in usurious contracts, and the courts apply all payments of interest, though made as such, upon the principal debt. *Moore* v. *Beaman*, 111 N. C. 328; *Gore* v. *Lewis*, 109 N. C. 539. In *Gill* v. *Rice*, 13 Wis. 553, the supreme court of Wisconsin held that, where no direction had been given by the debtor, the law would apply a payment upon a usurious contract to the extinguishment of the principal sum loaned. The same rule is adopted in *Stanley* v. *Westrop*, 16 Tex. 200. In *Bateman* v. *Blake*, 81 Mich. 227, this court applied the rule that on usurious contracts the payments, though made as interest, must be applied upon the lawful debt, although the statute at that time avoided the excess of interest only.

In the present case we need follow only the rule that, the payments being made generally, the court was right in deducting the payments from the lawful debt; that is, from the principal of the note.

The judgment below must be affirmed.

The other Justices concurred.

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GOFF v. COUGLE.

1. TITLE TO LAND—RIPARIAN RIGHTS—UNSURVEYED ISLAND.
Under a deed of land bounded by a meandered river, the grantee, *prima facie*, takes title to the middle thread of the main channel of the stream, and may maintain his right to a so-called "island" lying between such channel and the main land, as against one who, claiming through deeds of the "island," fails to show that the government ever surveyed or treated the intervening land as such.[1]

2. TRIAL—INSTRUCTIONS—EVIDENCE.
An instruction permitting the jury to find a certain fact is error, where there is no evidence upon which to base such a finding.

Error to Macomb; Eldredge, J. Submitted June 17, 1898. Decided October 3, 1898.

Trespass *quare clausum fregit* by Lewis B. Goff against Joseph Cougle. There was a judgment for plaintiff, and defendant appealed. Pending the hearing on appeal, defendant died, and the cause was revived in the name of his administrator, John Cougle. Judgment reversed.

Byron R. Erskine, for appellant.

Franklin P. Monfort, for appellee.

LONG, J. This action of trespass was brought in justice's court, and removed to the circuit on plea of title. The case was tried before a jury, who rendered a verdict in favor of plaintiff. Defendant brings error.

The plaintiff claimed to be the owner and in possession of an island in the Clinton river, in Macomb county. He introduced in evidence certain deeds of conveyance, describing the lands in controversy as: "Being the island

[1] With this case, as reported in 42 L. R. A. 161, is an extensive note on the title to land under water.

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in section 19, in township 3 north, of range 12 east, containing 21 37-100 acres, be the same more or less." The first deed offered in evidence by the plaintiff bears date January 9, 1833, given by James Cheney to Clem Cheney, and recorded in the office of the register of deeds of Macomb county, January 10, 1833. Deeds of this same description were also offered by him, as follows: Clem Cheney to James Cheney, July 29, 1834, recorded August 2, 1834; James Cheney and wife to Peleg D. F. Ewell, dated August 22, 1850, recorded May 8, 1851; Peleg D. F. Ewell to Franklin Selleck, dated December 5, 1851, recorded January 7, 1852; Franklin Selleck and wife to Lebbeaus Ewell, dated September 1, 1852, recorded September 22, 1852; Lebbeaus Ewell and wife to John George, dated October 7, 1853, recorded October 19, 1853; John George, by his executrix, to Sally George, dated April 6, 1864, recorded October 20, 1864; Martha J. Bacon *et al.*, heirs at law of Sally George, to Lewis B. Goff, plaintiff, dated March 5, 1894. Many of these deeds conveyed other lands, and in most of them the lands are designated as "the island in the Clinton river, section 19, town 3 north, range 12 east," etc.

Plaintiff introduced evidence tending to show that, since and up to and including the year 1897, he and his grantors had paid the taxes on the land in controversy. The lands are described on the tax rolls for the various years as the island, and central part of the southeast fractional quarter, of section 19. This land was assessed with other lands during those years. Some evidence was given tending to show that the Clinton river, up to and above this land, was a meandered stream, and the farms along it were surveyed as bordering on the river. Plaintiff also gave evidence tending to show that this so-called "island" was situate about the center of section 19; that, prior to 1842, the island was fenced all around on the inside of the channels of the stream by rail and brush fences, and that 19 years ago some traces could be seen of these fences; that it was cleared of timber except a few trees, and that,

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while the Cheneys owned it, they cut hay there, pastured the land, and sowed oats on a part of it; that there was but one island in the river; that, while Ewell owned it, he pastured it, building a bridge to it for his cattle and sheep to cross over; that others of plaintiff's grantors cut hay on the premises; that the fences, however, were not kept up for the last 15 years. Some of plaintiff's witnesses describe the land as being entirely surrounded by the waters of the Clinton river; that the Clinton river is the boundary line between the adjacent farms; and that the island is between the farms. The plaintiff testified, as to the trespass complained of, that defendant went upon the land, and commenced to build a fence next to the river; that he forbade the building of it; that defendant also cut some timber thereon.

It appeared, further, from the testimony of plaintiff's witnesses, that, some 30 or 40 years ago, the Clinton river was divided at the head of the island, the main channel extending to the southward along other lands owned by the plaintiff, cutting them off from the island, which is on the west side of the main channel. These lands on the main shore were also owned by the plaintiff's grantors, and the island used in connection with them. The defendant owned the lands to the southwesterly. Plaintiff's witnesses say that in the earlier days there was a well-defined channel between the lands now owned by the defendant and the lands in controversy, so that, by the coming together of the waters which are divided at the head of the lands, the island is formed. These witnesses leave it somewhat uncertain as to the time when the waters of the river became so dried up that the channel on the southwesterly side was not filled except in times of high water, though they say that there is a well-defined channel there now, through which the water flows in times of high water.

The defendant claims title to the lands by conveyances as follows: A warranty deed from Ephraim Calkins and wife to Joseph Cougle, dated December 11, 1846, conveying, among other lands, a parcel —

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"Beginning at the quarter stake on the north side of section 30, in township 3 north, of range 12 east; thence running south, along the line through the center of said section, 5 chains and 75 links; thence south, 75 degrees east, with the nonius set 4½ degrees east of north, 12 chains and 75 links; thence north, parallel with the line through the center of section 19 in said town, 29 chains and 10 links, to the bank of Clinton river; thence up said Clinton river, to the said center line; thence south, along said center line, 24 chains and 66 links, to the place of beginning. Also one other piece of land, beginning at the quarter stake; thence running south, along the line from the center of said section 30, to a stake standing 10 chains north from the center stake of said section 30; thence west, parallel with the north line of said section, 12 chains and 50 links; thence north, parallel with said center line, to the north line of said section; thence north, on a line parallel with the line of section 19, to the north line of the southwest fractional quarter of said section 19; thence, along the north and east lines of said fractional quarter, to the place of beginning. All in the town of Shelby, Macomb county, Michigan; containing 111 75-100 acres, more or less."

This deed was recorded February 21, 1848.

Defendant also offered in evidence a warranty deed from Fitch Rossman and wife to Ephraim Calkins, dated February 2, 1835, conveying the E. fractional ½ of the S. W. fractional ¼ of said section 19, recorded December 9, 1835; also a deed from N. C. Naramour to Ephraim Calkins, conveying the land described in the deed from Calkins and wife to Joseph Cougle. These deeds describe the lands known and described in the plaintiff's deeds as the island in the Clinton river, unless it may be said that the deeds are limited to the lands extending only to the south channel of the river.

Defendant contended that the lands claimed by plaintiff do not constitute an island; that they were never surveyed as such by the United States government; that what is spoken of as the south or old channel, the southern boundary of the so-called "island," is but an old ravine, which at times is perfectly dry; that the Clinton river lies be-

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tween the lands in dispute and the plaintiff's land; and that such land is wholly on the defendant's side of the river. Defendant gave testimony tending to show that there was little or no water in the so-called "south channel," except in high water, and had not been for more than 40 years, and in fact that there had never been an island there for that length of time. Defendant further gave evidence tending to show that he had pastured the land, and used it in connection with his other land, for more than 40 years; also, that the main channel of the river had been recognized as the boundary between the farms for more than 20 years; that the so-called "island" had never been plowed or any hay cut upon it. He also offered in evidence tax receipts for the year 1857, and many other years since, showing that the lands had been assessed under the description of his lands, and the taxes paid by Joseph Cougle. Some evidence had been given on the part of the plaintiff tending to show that Joseph Cougle made overtures for the purchase of these lands from some of plaintiff's grantors. This was denied by defendant. Plaintiff also gave some evidence tending to show that the defendant's intestate had felled trees and brush in and across this ravine or channel to keep the water from flowing therein.

The main question raised by counsel for defendant relates to certain portions of the charge, which will be referred to hereafter.

There is no evidence in the case that this so-called "island" had ever been surveyed as such by the government. There is nothing upon the record to show but that this parcel of land belonged to, and was surveyed by the government as a part of, the governmental description which would be included in the lands of the defendant. The plaintiff did not trace title back to the government. The first deed in his chain of title is from James Cheney, in 1833, and does not refer to any governmental survey. What rights at that time James Cheney had in the land does not appear; nor does it appear that the government

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ever recognized it as an island. It is true that the deed from Cheney and wife to Ewell, in 1850, in describing the land, stated "according to the United States survey." No government plat is contained in the record; nor is any reference made in the record to any authority from the government to treat this land as an island surveyed and separated from the main land, so that it became detached by the government from the quarter section of which it naturally became a part. The main channel of the river is between the plaintiff's land and that in controversy. It is a stream of considerable size; and the defendant's testimony, as well as considerable of plaintiff's testimony, shows that this "south channel," so called, is in fact comparatively dry, except in the time of freshets. Yet the court charged the jury that if the government surveyors surveyed, measured, and designated it as an island, and the jury found that there was an island there and thus surveyed, they might consider that parcel of land as the land conveyed by the various conveyances to the plaintiff; or, if the parcel of land so surveyed or so commonly known and designated as an island was the parcel of land on which the defendant did the acts complained of, even if it appeared that it was not usually surrounded by water, so that it could not properly be termed an island, yet they would be justified in considering that parcel as the island covered by the conveyances from Cheney to plaintiff. Counsel for defendant contends that this portion of the charge not only permitted the jury to find, but assumed, that the island had been surveyed by the government; and this without any evidence whatever to base such finding upon. Upon the defendant's theory and claim in the case, this parcel was included within the description of his farm, and his lands extended to the thread of the main channel of the river. He contended that he took possession of his farm in 1846, very soon after he received his deed from Calkins, and that he had used this piece of land in connection with his farm ever since, and had pastured his cows there for 40 years. We

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think the court was in error in this portion of the charge.

The court charged the jury that there was no evidence that the plaintiff had acquired title by adverse possession. Whether there was such evidence given by the plaintiff we need not now consider, as that question was not submitted to the jury, and the plaintiff is not here complaining of that, he not having appealed.

The court left the question to the jury to determine whether or not there was an island in the river, and the jury must have found that there was; so that question must be taken as settled that there was an island in fact. But, so far as the record shows, there was no island there which had been recognized by the government as such, and which was no part of the main land. The deeds to defendant conveyed to him the lands in controversy, unless the south channel is treated as the Clinton river, within the meaning of the deeds. The deeds cannot be so construed, as even upon meandered streams the lands extend to the middle thread; and it appears that the north channel is the main channel, so that defendant's deeds conveyed lands extending to the middle of the main channel. These deeds were given in 1846. Can it be said that the plaintiff, without showing some conveyance from the government to himself of this land, describing and designating it as an island, has shown a paramount title? We think not. In *Railroad Co.* v. *Schurmeir*, 7 Wall. 272, the question was as to the title to an island in the Mississippi river, which at the time of the survey was a mere sand-bar, about 90 feet wide and 160 feet long, separated from the main land by a slough or channel 28 feet wide. The island was submerged at high water (of which no notice was taken in the survey), and the slough was insignificant in comparison with the main river. At the time of the action, the sand-bar had been filled in and covered with valuable improvements; and the contest was between the owner of the adjoining fraction and the railroad company, which claimed the bar under a new survey made by a United States surveyor, and a congressional grant of

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certain odd-numbered sections. It was held that the sand-bar was included in the first survey as a part of the main land.

Prima facie, the title of the riparian owner extends to the middle thread of the stream. The defendant's deeds presumptively, under the facts shown here, convey the title to the land in controversy, and that presumption is not overcome by the plaintiff's deeds.

We think no other questions need be discussed.

The judgment below must be reversed, and a new trial granted.

The other Justices concurred.

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PINGREE *v.* MICHIGAN CENTRAL RAILROAD CO.

1. RAILROAD COMPANIES — TRANSPORTATION CHARGES — LEGISLATIVE CONTROL.
   The legislature has the power, within certain limits, to regulate the rates to be charged by railroad companies for transportation.[1]

2. SAME—CHARTER—IMPAIRMENT OF CONTRACT.
   But the power to fix rates within a prescribed maximum may be so directly conferred upon a company by its charter as to render interference by subsequent legislatures an impairment of the obligation of a contract.

3. SAME—MICHIGAN CENTRAL CHARTER—CONSTRUCTION.
   Section 15 of the Michigan Central charter (Act No. 42, Laws 1846) provides that it shall be lawful for the company, from time to time, to fix, regulate, and receive the tolls and charges to be taken for the transportation of property and persons on

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[1] The power of the legislature to fix tolls, rates, and prices is the subject of an extensive note to *Winchester, etc., Turnpike Road Co. v. Croxton*, (Ky.) 33 L. R. A. 177.

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its road, *subject only* to a limitation as to passengers of three cents a mile, and ten cents in addition on distances not exceeding thirty miles. But section 11 contains the provision that "the said company shall have power to charge for tolls and transportation such sums as shall be *lawfully* established by the by-laws of said company;" and section 30 confers upon the board of directors the power to pass all by-laws necessary to carry into execution the powers vested in the company: "*Provided*, such by-laws shall not be contrary to the Constitution or laws of the United States or of this State." *Held*, that section 15 confers upon the company the contract right to regulate the rate of charges for the transportation of passengers, within the limit of three cents per mile, and that such right is not qualified by sections 11 and 30.

4. SAME—ENLARGEMENT OF POWERS—DISSOLUTION OF CORPORATION.

In 1846 the Michigan Central Railroad Company became a corporation, with the right under its charter to operate a railroad within the borders of the State, the State reserving an option to repurchase upon specified terms. By Act No. 197, Laws 1848, the legislature authorized the corporation to build and operate a railroad from the southern line of the State to Chicago. *Held*, that, even if the option of the State was impliedly repealed by reason of the later act destroying the basis of fixing the price, such an enlargement of the corporate powers did not operate to dissolve the original corporation, and create a new and different one.

5. SAME.

Act No. 139, Laws 1855, authorizing said company to build a double track, and to sell bonds therefor, and to make business contracts with other railroads, organized or to be organized, for the operation thereof by said company, did not dissolve the corporation, and create a new corporation, subject to the provision of the Constitution of 1850 reserving to the legislature the power to amend, alter, or repeal the charters of all corporations afterwards created.

6. SAME—CONSOLIDATION—STATUTORY AUTHORITY—STRICT COMPLIANCE.

Statutes authorizing the consolidation of railroads must be substantially complied with in order to effect the formation of a new corporation.

7. SAME—INTENT.

Where the enabling act is ambiguous or uncertain, the intent of

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the companies may be an important consideration in determining whether a consolidation has been effected in a given case.

8. SAME.

The Michigan Central Company, by availing itself of special statutory authority to make business arrangements with other companies, with a view to operating their roads as branch lines, did not effect a consolidation with such companies, so as to become merged in a new corporation under the terms of the general statute.

9. SAME—FAMILY MILEAGE ACT—AMENDMENT OF CHARTER.

Act No. 90, Pub. Acts 1891, providing for the issuance of family mileage tickets, cannot be deemed an exercise of the power of amendment reserved in the charter of said company, subject to the provision that the company should be compensated for all damages sustained by reason of amendment, as it does not purport to be an amendment of the charter, and contains no provision for compensating the company for the loss of its exclusive right under the charter to fix its fares.

Certiorari to Wayne; Donovan, J. Submitted June 18, 1898. Decided October 3, 1898.

Mandamus by Hazen S. Pingree to compel the Michigan Central Railroad Company to issue a family mileage book. From an order granting the writ, respondent brings *certiorari*. Reversed.

Fred A. Maynard, Attorney General, and *John Atkinson*, for relator.

Ashley Pond and *Henry Russel* (*Benton Hanchett* of counsel), for respondent.

HOOKER, J. The circuit court for the county of Wayne granted a *mandamus* to compel the respondent to issue to relator a ticket, popularly known as a "family mileage ticket," described in Act No. 90 of the Public Acts of 1891. This act has been considered in the case of *Smith* v. *Lake Shore & Michigan Southern R. Co.*, 114 Mich. 460, and held applicable to that company, which, like the respondent, was one of the railroad companies

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chartered by the legislature previous to the adoption of the Constitution of 1850, which reserves the power of amendment and repeal as to all corporations thereafter created. Many of the questions raised in that case are before us upon this record, but such as are covered by the decision mentioned need not be discussed here.

It is the claim of the railroad company that its original charter constituted a contract between itself and the State, whereby it was given the right to fix the rate to be charged for the transportation of passengers, within the limit of the maximum rate therein prescribed, of three cents a mile, and to regulate the manner of collecting the same; and that these privileges cannot be revoked or altered except upon compliance with the reservation of power to be found in the charter, viz., by compensating the company therefor. The relator contends:

1. That the legislature has the general power to fix rates of transportation by railroads.
2. That it cannot part with this authority, by contract or otherwise, so as to bind succeeding legislatures.
3. That, if such a thing were possible, the charter of the respondent should not be so construed.
4. That, even if the charter had the effect contended for, it has been surrendered, or so altered by its consent, that the respondent is subject to the provisions of the general railroad law and the Constitution of 1850.
5. That, if not lost by surrender, it is lost by virtue of Act No. 90, hereinbefore mentioned, which must be treated as an amendment under the charter, taking away the right to fix tolls, but subject to the right of the company to recover damages from the State in a proper proceeding.

Relator's first proposition, viz., that the legislature has power to fix rates, within certain limits, is not an open question. It has been so held in the cases of *Wellman* v. *Railway Co.*, 83 Mich. 592, and *Smith* v. *Railway Co.*, 114 Mich. 460, where the authorities are cited.

To the assertion that the right to regulate tolls belongs to the police power, and cannot be bartered away, we reply that the almost uniform current of judicial authority

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is to the effect that such power may be given to corporations, and that, where the intent to do so is clear, a subsequent attempt by the legislature to fix tolls is the violation of a contract, under the provisions of the Federal Constitution. We will allude to some of the cases which the industry of counsel has collected. In the case of *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S. 650, it appeared that the legislature had, in 1875, granted to the gas company the exclusive right for 50 years to supply gas to the city of New Orleans through pipes laid in the public streets. Subsequently, by a new constitution, adopted in 1879, it was provided that the "monopoly features" in the charters of all existing corporations save railroads should be abolished, and in 1881 the light company was authorized to use the streets of New Orleans for the purpose of supplying gas to the public. A bill filed to restrain this project was dismissed by the local court, and the United States Supreme Court reversed the decree. The unanimous opinion of the court, delivered through Mr. Justice Harlan, recognized the right of the State, in the exercise of the police power, to carry on the business of furnishing gas itself, or select one of several agents to do so, but held that "the police power, according to its largest definition, is restricted in its exercise by the National Constitution;" that "this is shown by those cases in which grants of exclusive privileges respecting public highways and bridges over navigable streams have been sustained as contracts, the obligations of which are fully protected against impairment by State enactments." As supporting the proposition, the distinguished jurist cited *Bridge Proprietors* v. *Hoboken Co.*, 1 Wall. 116; *The Binghamton Bridge*, 3 Wall. 51; *West River Bridge Co.* v. *Dix*, 6 How. 507, 531. He approved the language of Chief Justice Martin in *Pontchartrain R. Co.* v. *Orleans Nav. Co.*, 15 La. 404, 413, where he says:

"In the same manner as Congress may reward the discoverer of a new invention or mode of constructing roads by an exclusive privilege, the legislature may reward

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those who employ their capital and industry in doubtful enterprises for the construction of a railway between two points, which may be of great utility to the public, though the success of the enterprise may be precarious."

Allusion was also made to cases in which it is held that an exemption from taxation for a valuable consideration, at the time advanced, constitutes a contract within the meaning of the Constitution.

In the case of *Bridge Proprietors* v. *Hoboken Co.*, *supra*, Mr. Justice Miller, in discussing a grant of an exclusive right to erect and maintain a bridge, said that:

"Without this, they would not have invested their money in building the bridges, which were then much needed, and which could not have been built without some such security for a permanent and sufficient return for the capital so expended. On the faith of this enactment they invested the money necessary to erect the bridges. These acts and promises on the one side and the other are wanting in no element necessary to constitute a contract."

The case of *Binghamton Bridge*, *supra*, involved the question whether a charter to a company, authorizing it to build and maintain a bridge for the accommodation of the public, for which it was given the right to take certain tolls, and providing that it should be unlawful for any one to build a bridge within two miles, constituted a contract within the meaning of the Constitution. The question arose by reason of the erection of another bridge. It was held to be a contract, in the following vigorous language of Mr. Justice Davis:

"If anything is settled by an unbroken chain of decisions in the Federal and State courts, it is that an act of incorporation is a contract between the State and the stockholders. * * * A departure from it now would involve dangers to society that cannot be foreseen, would shock the sense of justice of the country, unhinge its business interests, and weaken, if not destroy, that respect which has always been felt for the judicial department of the government. * * * The purposes to be attained are generally beyond the ability of individual enterprise, and can only be accomplished through the aid of asso-

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ciated wealth. This will not be risked, unless privileges are given and securities furnished in an act of incorporation. The wants of the public are often so imperative that a duty is imposed on the government to provide for them; and, as experience has proved that a State should not directly attempt to do this, it is necessary to confer on others the faculty of doing what the sovereign power is unwilling to undertake. The legislature, therefore, says to public-spirited citizens: 'If you will embark, with your time, money, and skill, in an enterprise which will accommodate the public necessities, we will grant to you for a limited period, or in perpetuity, privileges that will justify the expenditure of your money, and the employment of your time and skill.' Such a grant is a contract, with mutual considerations; and justice and good policy alike require that the protection of the law should be assured to it."

Recurring to the case of *New Orleans Gas Co.* v. *Louisiana Light Co.*, *supra*, where the foregoing authorities are commented upon, we find a distinction clearly drawn between cases where the grants have been claimed to confer privileges injurious to public morals or public health, and those where they compensated persons for performing a public service; and the case elaborates still further the proposition that a State cannot justify the repudiation of its solemn engagements by the claim that the police power cannot be diminished.

The existence of this power on the part of the legislature to bind the State, by a grant of a right to take tolls, is one thing, and the question whether it has been exercised is quite another. We shall find numerous cases where it has been held that the State has not parted with this power, and, we may add, many of these seem to admit that such a contract may be made by apt and clear language showing such intent. The case of *Stone* v. *Railroad Co.*, 62 Miss. 607 (52 Am. Rep. 193), is a case in point. The railroad company was incorporated by an act of the legislature of the State of Mississippi approved February 17, 1882, which contained the following, among other sections:

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"SEC. 6. That said company shall have and possess the power of fixing, from time to time, by its board of directors, the rates at which it will do express and telegraph business, and shall transport other express companies as may apply for transportation over its line, at a just and reasonable rate of compensation, and also the rates at which said company will transport persons or property over its railroads and branches: *Provided*, said last-mentioned rates shall not exceed four cents per mile for each passenger, nor exceed the following rates of freight: * * * but in no case shall the railroad company be limited to a less charge than 25 cents for the transportation of any passenger, parcel, package, or article, however short the distance. The rates so established from time to time by the said board of directors for transporting persons or property as a railroad company, not exceeding the maximum rates for railroad business as above set out, may be charged and collected by said company."

Subsequently the legislature provided a commission with power to reduce rates. The court of last resort disposed of the case in a forceful opinion, which fully recognizes the rule that a grant of a right to fix tolls may be a valid contract. It is as follows:

"Section 6 of the charter of the appellee confers on the company power to fix, from time to time, by its board of directors, the rates at which it will transport persons or property over its railroads, provided they shall not exceed a maximum specified in the act.

"The power to contract is an essential attribute of sovereignty, and is of prime importance. Its exercise has been productive of incalculable benefits to society, however great may be the evils incident to its injudicious employment. It cannot be denied merely because of its liability to abuse. The power to contract implies the power to make a valid contract. Chartering railroad companies and other similar associations has long been an acknowledged and a favorite exercise of legislative authority. The right to grant charters includes the right to grant such as will be upheld. * * * A grant in general terms of authority to fix rates is not a renunciation of the right of legislative control so as to secure reasonable rates. Such a grant evinces merely a purpose to confer power to exact compensation which shall be just and reasonable.

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It is only where there is an unmistakable manifestation of a purpose to place the unrestricted right in the corporation to determine rates of compensation that the power of the legislature afterwards to interfere can be denied. It is not to be presumed that the right of legislative control was intended to be renounced. Every presumption is against that. If the grant can be interpreted without ascribing to the legislature an intent to part with any power, it will be done. Only what is plainly parted with is gone. Fixing rates in a charter is a specification of what is reasonable,—an exclusion of tacit or implied conditions on the subject. It is an essential part of the contract of incorporation, the most important condition of its existence, the inducing cause of its acceptance.

"That it was the legislative intent to vest in the appellee the unrestricted right to fix rates within the limits prescribed by the charter is clear. That this was a valid contract by the State, and inviolable by it, we regard as settled authoritatively by Federal and State decisions too numerous for citation. If anything is, or ever can be, settled in American constitutional law, the sanctity and inviolability of a contract between a State and individuals, in the shape of a charter for a business enterprise, accepted and acted on by the corporators on the faith of its terms and provisions, must be so regarded. The appellee has the unquestionable right, from time to time, by its board of directors, to fix the rates at which it will transport over its railroads, provided those rates shall not exceed the maximum prescribed by the charter. That is the contract. These terms were expressly made. On the faith of them capital was invested, and the enterprise set on foot. It is not allowable now for one of the contracting parties to interfere with the exercise by the other of its plainly granted rights. They are secured beyond the reach of legislation, and cannot be impaired. The State cannot, by an act of its legislature, abdicate the right to govern artificial as well as natural persons, but it may create corporations, and, where they are not a part of the machinery of government, the franchise cannot be resumed by the legislature, or its benefits be essentially impaired, without the consent of the grantee. To hold otherwise would be revolutionary, and disturb the foundations of society as molded by the judicial utterances of half a century of constitutional government in America."

We think there is no force in the suggestion that this

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decision might have been different had the legislature itself fixed the reduced rate, instead of attempting to delegate the authority to a commission.

See, also, *Georgia, etc., Banking Co.* v. *Smith*, 128 U. S. 174, where Mr. Justice Field said:

"It is conceded that a railroad corporation is a private corporation, though its uses are public, and that a contract embodied in terms in its provisions, or necessarily implied by them, is within the constitutional clause prohibiting legislation impairing the obligation of contracts. If the charter in this way provides that the charges which the company may make for its services in the transportation of persons and property shall be subject only to its own control up to the limit designated, exemption from legislative interference within that limit will be maintained."

In the case of *Reagan* v. *Trust Co.*, 154 U. S. 362, Mr. Justice Brewer said:

"If the charter had in terms granted to the corporation power to charge and collect a definite sum per mile for the transportation of persons or property, it would not be doubted that the express stipulation formed a part of the obligation of the State, which it could not repudiate."

In the case of *Chicago, etc., R. Co.* v. *Iowa*, 94 U. S. 155, Chief Justice Waite used similar language. He said:

"It was within the power of the company to call upon the legislature to fix permanently this limit, and make it a part of the charter, and, if it was refused, to abstain from building the road and establishing the contemplated business. If that had been done, the charter might have presented a contract against future legislative interference; but it was not, and the company invested its capital relying upon the good faith of the people and the wisdom and impartiality of legislators for protection against wrong under the form of legislative regulation."

Again, in *Peik* v. *Railway Co.*, 94 U. S. 164, he said:

"In *Munn* v. *Illinois*, 94 U. S. 113, and *Chicago, etc., R. Co.* v. *Iowa*, Id. 155, we decided that the State may limit the amount of charges by railroad companies for fares and freights, unless restrained by some contract in

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the charter, even though their income may have been pledged as security for the payment of obligations incurred upon the faith of the charter. So far this case is disposed of by those decisions."

The same power is recognized in the case of *Ruggles* v. *Illinois*, 108 U. S. 526.

The case of *State* v. *Maine Cent. R. Co.*, 66 Me. 488, supports the doctrine that a valid contract may be made, though restrictive upon the subsequent exercise of the police power,—citing numerous authorities; and we may conclude the discussion of this subject as we commenced it, by saying that, as we understand the authorities, they are practically uniform upon the main proposition.

Having reached the conclusion that the State had power to make a valid contract with the respondent, whereby it was authorized to fix rates, we will next examine the charter, to ascertain whether its language should be so construed. The history of this charter is familiar. The State had entered upon a policy of internal improvement, which, at the time this charter was granted, had been found impolitic and disastrous, and the Constitution adopted soon after reflected public sentiment by prohibiting the State from engaging in any work of internal improvement except by grant of property. It had commenced to build lines of railroad across the State. The public documents of the day, such as gubernatorial messages and legislative papers, clearly indicate that negotiations were had for the sale of the Central road, in which the price to be paid and the privileges to be accorded were carefully weighed. In his message to the legislature Gov. Felch said:

"Much complaint has existed of the high charges for freight on these roads; yet, even at these rates, it is very doubtful whether anything has been received from this branch of their business above the expenses of transportation and the actual injury to the roads and their stock and fixtures. * * * It would seem that true policy requires that the Central road should be speedily rebuilt with T. or H. rail. * * * No direct proposition for

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the purchase of these works, or either of them, has yet been made, but it is understood that there are those who are ready to negotiate for the purchase, if it can be made on terms sufficiently favorable. The granting of an act of incorporation to the purchasers seems to be deemed indispensable. The reluctance of many of our citizens to see these important works fall into the hands of corporate bodies has occasioned some opposition to the proposed sale, and it must be admitted that this objection is not without weight. If the legislature should entertain the proposition favorably, it will, of course, be in their power to annex to the corporation such guards and restrictions as shall best secure the public interests. A maximum rate of tolls may be established in the charter. The company may be required to finish the road in the best possible manner, and in such time as the legislature may designate, and to keep it in the best possible repair and in constant operation. The right of repurchase after a certain period and on certain conditions may, if deemed advisable, be retained by the State, and a simple method in case of forfeiture of the chartered privileges may be adopted for annulling the charter and revesting the property in the State. But, while every requisite guard should be thrown around such chartered rights, it should be remembered that the facilities granted in such charter will be regarded as of the utmost importance by those proposing to purchase, and the character of the provisions may very possibly determine the question whether or not a sale can be effected. The utmost discretion is therefore necessary in so framing the provisions of such a charter as to protect as fully as possible the public weal on the one hand, and not to defeat the possibility of a sale by unusual restrictions and impracticable requirements on the other." Joint Documents 1846, Introduction, pp. 27, 28.

The legislative records show the following:

"The select committee to whom was referred so much of the message of the governor as relates to the sale of the works of internal improvement, and to whom have been also referred great numbers of petitions very numerously signed, and coming from almost every portion of the State, praying for the sale of the public works, beg leave to report: * * * It is without precedent that any company has brought to the West such an amount of money to be invested in any enterprise. In looking

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through the length of the land, your committee find but one district of country in which capital to that amount can be well spared for investment at a distance, and but one class of men in that district whose vigilant and far-seeing eye would be likely to engage them in such an adventure. The men named in the bill presented are of that class. Of their ability to take and complete the road no doubt is entertained, and your committee have strong grounds to believe that they will purchase the road on the terms proposed, if the bill shall become a law in its present shape; but, in case any material alteration is made, they cannot anticipate with any confidence such a result. * * * To protect the people against unreasonable charges for freight and passengers, the maximum for passengers within the State is three cents per mile, and upon the great staples of produce and consumption, flour, grain, lime, plaster, salt, * * * the tolls are limited to the average of tolls on the best New England roads upon the same articles; these rates to be reviewed and adjusted once in ten years, if the State desires it." House Documents 1846, Doc. No. 2.

"That the Central and Southern roads present sufficient inducements to capitalists to make a purchase desirable seems to be generally conceded, but the sum of money they will bring cannot, of course, be ascertained until terms of sale are proposed and an offer made. * * * Again, the amount of money which a company would be willing to pay would be increased or diminished by the extent of the privileges and corporate powers which the legislature might see fit to grant. Unusual restrictions or reservations would either prevent a sale altogether, or lessen very materially the price which the purchaser might otherwise be willing to give. The policy of the legislature in this respect should be, in the opinion of your committee, to grant a charter delegating liberal powers and privileges, but so defined and guarded as to keep the companies in proper check and prevent abuse. On such terms a sale could probably be effected, while it might be impracticable to sell should greater restrictions be imposed. Capitalists will not invest their money where the rights to be acquired are ill-defined, or where they can be interfered with, or taken away, at the option of a legislature." Senate Documents 1846, Doc. No. 9.

It would seem obvious that the granting of a right to fix tolls within a limit prescribed was intended.

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The first section of the act (Act No. 42, Laws 1846) created the corporation. The second provided for the purchase of the road and property pertaining thereto for the sum of $2,000,000. Section 3 provided for a forfeiture and dispossession in case of a failure to meet the payments as agreed upon. Section 12 provided:

"The said company * * * shall have power to regulate the time and manner in which goods and passengers shall be transported, taken, and carried on said railroad, as well as the manner of collecting all tolls and dues on account of transportation, carriage, and storage."

Section 15 provided that it should be lawful for said company, from time to time, to fix, regulate, and receive the tolls and charges taken for the transportation of property and persons on said railroad, subject only to a limitation as to passengers of three cents a mile, and ten cents in addition on distances not exceeding thirty miles.

The following provisions of sections 36 and 39 may be mentioned in this connection:

1. The State reserves the right, at any time after January 1, 1867, to purchase said railroad, and all the property, effects, and assets of the company, upon terms named, based upon the market value of the property at the time of such purchase.

2. The rights and franchises vested or which may vest in the company under or by virtue of said act "shall not in any manner be prejudiced or affected save as herein provided, or by judicial proceedings, or by a repurchase of said railroad, to be made by the State" as in said section (36) provided.

"3. The State reserves the right, at any time after thirty years from the passage of this act, by a vote of two-thirds of each branch of the legislature, to alter, amend, or repeal the same: *Provided*, that said company shall be compensated by the State for all damages sustained by reason of such alteration, amendment, or repeal."

Section 15 makes it lawful for the company to use its own judgment in fixing tolls, and provides that it shall not receive more than three cents per mile for the transportation of passengers, and imposes a penalty for charging

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more. In the case of *Georgia, etc., Banking Co.* v. *Smith*, 128 U. S. 174, a charter containing the following provision was before the court:

"The said Georgia Railroad Company shall, at all times, have the exclusive right of transportation or conveyance of persons, merchandise, and produce over the railroad and railroads to be by them constructed, while they see fit to exercise the exclusive right: *Provided*, that the charge of transportation or conveyance shall not exceed fifty cents per hundred pounds on heavy articles, and ten cents per cubic foot on articles of measurement, for every one hundred miles, and five cents per mile for every passenger."

At first blush this might seem to authorize the fixing of rates within the limit of five cents a mile. But the court held otherwise. It will be noticed that the provision there construed gave to the railroad an exclusive use of the road, which theretofore was supposed to be open to use by others, upon the proviso that the charge for transportation should not exceed five cents. So long as this price was not exceeded, the right would continue exclusive; but it did not follow that a contract right to fix tolls up to five cents was conferred. The section contained no express grant of power, and none is necessarily implied. Such was the construction of the court, but it was careful to say:

"If the charter in this way provides that the charges which the company may make for its services in the transportation of persons and property shall be subject only to its own control up to the limit designated, exemption from legislative interference within that limit will be maintained."

Again, there is a class of cases where charter provisions give the right to fix rates in general terms. That is no more than the common carrier would have by implication were the charter silent upon the subject of compensation. In *Stone* v. *Trust Co.*, 116 U. S. 307, the charter under consideration granted to the company the right, "from time to time, to fix tolls and charges." It prescribed no limit. The court held that, in the absence of words of

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positive grant, or their equivalent in the law, the power of the State to regulate would not be cut off, and that reasonable doubts should be resolved in favor of the State; citing the words of Mr. Chief Justice Marshall in *Providence Bank* v. *Billings*, 4 Pet. 514, 561, that "its abandonment ought not to be presumed in a case in which the deliberate purpose of the State to abandon it does not appear;" citing, also, *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 420; *Minot* v. *Railroad Co.*, 18 Wall. 206; *Bailey* v. *Magwire*, 22 Wall. 215; *Fertilizing Co.* v. *Hyde Park*, 97 U. S. 659; *Newton* v. *Commissioners*, 100 U. S. 548. Referring to the provision of the charter, the court said:

"We find, first, the authority given to carry persons and property. This of itself implies authority to charge a reasonable sum for the carriage. In this way the corporation was put in the same position a natural person would occupy if engaged in the same or like business. Its rights and privileges in the business of transportation are just what those of a natural person would be under like circumstances; no more, no less. The natural person would be subject to legislative control as to the amount of his charges; so must the corporation be."

In short, the provision that it might, from time to time, fix tolls, was a grant of nothing that it would not have had the right to do had it not been inserted, and did not have the effect of enlarging its rights, as no intention to do so was apparent.

In *Stone* v. *Illinois Cent. R. Co.*, 116 U. S. 347, the charter granted power "to establish such rates for transportation as they may deem proper, and to alter and change them at pleasure;" and it was held that it did not show an intent on the part of the legislature to part with the power to regulate. The provision was substantially the same as that in *Stone* v. *Trust Co.*, *supra*. The other railroad commission case — *Stone* v. *New Orleans, etc., R. Co.*, 116 U. S. 352 — needs no discussion further than to say that the charter there discussed expressly reserved to the legislature the power to regulate rates.

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The charter of the respondent contains a direct grant of power to fix, regulate, and receive tolls. It also fixes what it evidently considered a reasonable rate as to passengers, viz., three cents per mile. It clinches the matter by providing that the respondent's right to fix tolls should be limited by this rate of three cents, and by that *only*. It was not, then, a general grant of power, and therefore limited to fixing rates the reasonableness of which should be determined by the usual methods, and consequently the same power as any individual or corporation would have without it, but was intended to confer a contract right to fix tolls, within the limit of three cents a mile, as plainly as though it had provided that said road should have the right to charge three cents a mile, or less, in its discretion, for transportation of passengers. It will be noticed in the cases cited that in no case where a maximum rate was fixed has the right of the company to fix tolls to that amount been denied. This case is even stronger than such, inasmuch as the charter expressly fixes the limitation, and unqualifiedly states that such shall be the *only limitation* of the company's power.

But our attention is called to the provisions of sections 11 and 30, which are said to limit the power conferred by section 15. Section 11 contains the provision that "the said company shall have power to charge for tolls and transportation such sums as shall be lawfully established by the by-laws of said company." Section 30 confers upon the board of directors the power to do many acts, and concludes as follows: "And shall have power to pass all by-laws which may be necessary for the carrying into execution all the powers vested in the company hereby incorporated: *Provided*, such by-laws shall not be contrary to the Constitution or laws of the United States or of this State." It is contended that these provisions negative any contract right, to the exclusion of regulation of rates by the legislature, that otherwise might be conferred by section 15, and we are cited to *Ruggles* v. *Illinois*, 108 U. S. 526, in support of the contention. The charter

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provisions in that case conferred only a general power to fix rates, and we have already shown that such provisions do not confer a right to do more than fix reasonable rates within the limits that the legislature may, from time to time, prescribe. The provision was as follows:

"Shall have power to make, ordain, and establish all such by-laws, rules, and regulations as may be deemed expedient and necessary to fulfill the purposes and carry into effect the provisions of this act, and for the well ordering, regulating, and securing the affairs, business, and interest of the company: *Provided*, that the same be not repugnant to the Constitution and laws of the United States, or of this State, or repugnant to this act."

The court, after quoting the above provision, which was a part of an amending section (section 6), proceeds as follows:

"By section 5 all the powers of the company were vested in and could be exercised by the directors. Clearly, under this authority no by-law can be established by the directors that does not conform to the laws of the State, and this whether the laws were in force when the amended charter was granted or came into operation afterwards. The power of the company for the regulation of its own affairs was thus in express terms subjected to the legislative control of the State. The corporate power was a continuing one, and intended for the ordering of the affairs of the company as circumstances might, from time to time, require. The reserved control by the State was also continuing in its nature, and manifestly intended for the protection of the public whenever, in the judgment of the legislative department of the government, the necessity should arise.

"Then follows the special provision on which the claim of a contract is predicated. It is as follows:

"'The board of directors shall have power to establish such rates of toll for the conveyance of persons or property upon the same as they shall, from time to time, by their by-laws, determine, and to levy and collect the same for the use of the company.'"

In commenting upon this the court said:

"Grants of immunity from legitimate governmental control are never to be presumed. On the contrary, the

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presumptions are all the other way, and, unless an exemption is clearly established, the legislature is free to act on all subjects within its general jurisdiction as the public interests may seem to require. As was said by Chief Justice Taney, speaking for the court, in *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 420, 547: 'It can never be assumed that the government intended to diminish its power of accomplishing the end for which it was created.' This is an elementary principle. In *Chicago, etc., R. Co.* v. *Iowa*, 94 U. S. 155, *Peik* v. *Railway Co.*, Id. 164, and *Winona, etc., R. Co.* v. *Blake*, Id. 180, it was determined that 'a State may limit the amount of charges by railroad companies for fares and freights, unless restrained by some contract in the charter.' The right to a reversal of the present judgment rests on the question whether this company has any such restraining contract, and that depends on the effect to be given the amending section 6.

"The company, by its original charter, was authorized to transport passengers and property, and to receive compensation therefor. This, if there had been nothing more, would, under the rule stated in *Munn* v. *Illinois*, 94 U. S. 113, and the several railroad cases decided at the same time, require the company to carry at reasonable rates, and leave the legislature at liberty to fix the maximum of what would be reasonable. So that, laying aside the limitations of the old charter, the question here is whether the amending section relied on has the effect of taking away from the State this power of legislative regulation. * * * This is the form in which the power to charge and collect compensation for the carriage of persons and property was granted by the amended charter. The rates must be fixed by by-laws, and no by-law can be made that is at all repugnant to the laws of the State. The first paragraph of the section, with its proviso, prescribes generally what is necessary to the validity of a by-law, and the second allows the directors to fix rates by by-laws. It is undoubtedly true that the first paragraph neither adds to nor takes from the inherent power of a corporation to make by-laws for the regulation of its affairs, and that the proviso is nothing more than a legislative declaration of the principle of the common law that all by-laws must be reasonable, and not in conflict with the laws of the State. But the very fact that such a provision would have been implied adds to the significance of its incorpo-

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ration in express terms into the charter, and manifests a determination not to leave room for doubt as to the right of the State to use its legislative power if necessary for the regulation of the affairs of the corporation, at least by the enactment of general laws applicable to all corporations of a like character and engaged in a like business. There is nothing which, even in the remotest degree, indicates that a by-law fixing rates is to be of a different character from those regulating the other business of the company. When, therefore, in a section of the charter which expressly declares that no by-law shall be made that is in conflict with the laws of the State, we find that the rates of charge to be levied and collected for the conveyance of persons and property are to be regulated by by-laws, the conclusion is irresistible that only such charges can be collected as are allowed by the laws of the State. This implies that, in the absence of direct legislation on the subject, the power of the directors over the rates is subject only to the common-law limitation of reasonableness, for, in the absence of a statute or other appropriate indication of the legislative will, the common law forms part of the laws of the State to which the corporate by-laws must conform. But since, in the absence of some restraining contract, the State may establish a maximum of rates to be charged by railroad companies for the transportation of persons and property, it follows that, when a maximum is so established, the rates fixed by the directors must conform to its requirements, otherwise the by-laws will be repugnant to the laws."

It is noticeable that in the present case we do not "find the section granting the power to fix rates by by-law in the same section that declares that by-laws shall not be in conflict with the laws of the State," nor do we find a mere general authority to fix rates, nor a mere mention of a maximum rate. In construing this charter we must, as in any other case, endeavor to ascertain the intent of the legislature, and we are of the opinion that sections 11 and 30 should not be held to qualify the unambiguous grant contained in section 15.

We have yet to consider the question whether the right which is claimed under section 15 has been lost by surrender. Counsel assert that it has been lost by reason of

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respondent's acceptance of additional privileges under acts professedly or impliedly amendatory of its charter, and under the general railroad law; and, secondly, by reason of its consolidation with, or absorption of, the property and franchises of other railroad corporations of the State. It is said that in 1846 the Michigan Central Railroad Company became a corporation, with the right of perpetual succession, and the right to complete the half-finished railroad within the borders of this State, and to have a capital of $8,000,000; that at the present time the respondent has a continuous line through the States of Michigan, Indiana, and Illinois, and that it operates some and owns other railroads in this State, all of which it operates in conjunction with its own, the corporations owning which are said to have practically ceased to exist; that the roads are known to the public only as parts of the Michigan Central Railroad, and the companies which built them can only be reached through the Michigan Central; and that in some instances it owns the entire stock of such roads. We do not discover that it is asserted that the respondent's relations with these roads are unauthorized, and, if they were, we are not advised that the claim is made that the charter has been declared forfeited thereby. Our understanding of the claim is that, by drawing to itself these privileges and railroads, it has surrendered its rights under the original charter, and, through a consolidation, has become a new corporation, which, having come into existence since 1850, is subject to the powers reserved by the present Constitution.

In 1848, by Act No. 197, entitled "An act to amend an act entitled," etc. (describing the respondent's charter), the legislature extended the powers of the corporation theretofore formed, and authorized it to build and operate a railroad from the southern line of this State to Chicago. The charter, by section 36, reserved to the State the right to purchase the property of this company upon terms therein stated. Counsel say that the act of 1848 contained no saving clause as to the old charter, and that it

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destroyed the option of the State to purchase under section 36, because it destroyed the basis of fixing the price. We think a sufficient answer to this is the question "whether the repeal of section 36, thereby depriving the State of the right to purchase, would have dissolved the corporation." It must be manifest that it would not, and we know of no authority to support the proposition that an enlargement of the powers of a corporation puts an end to its life, and at the same time creates another. To follow this suggestion to its logical consequence under the Constitution of 1850, it might be contended that an effort on the part of the legislature to increase the powers of a corporation would result in diminishing them by operation of law. We think the amendatory acts had no such effect as to dissolve the corporation, whether they were enacted before or after the adoption of our present Constitution, and that the act of 1855 (Act No. 139) authorizing the Michigan Central to build a double track, and to sell bonds therefor, and to make business contracts and arrangements with other railroads, organized or to be organized, for operation thereof by the Michigan Central Company, had no such effect.

It is urged that the necessary effect of that amendment was to amend the general railroad law, inasmuch as it necessarily gave the other companies powers of dealing that they did not have under the general railroad law; and that while, under the general railroad law, they could only consolidate, under this act they could make business contracts and arrangements which amounted to consolidation, though not technically called such, and that the act, if treated as enlarging the charter, was void. We need not concern ourselves, at this juncture, with the question of the validity of this legislation. The only question we are concerned about is whether the then existing Michigan Central corporation was dissolved by it, and whether a new one arose, Phœnix-like, from its ashes. One thing would seem obvious: If the amendatory act was void, as suggested, it could hardly dissolve one corpora-

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tion or create another; if valid, we know of no authority which indicates that it must have the effect suggested. All of the acts purporting to amend the charter contain language indicating the right of the company to accept or reject such amendments, and they were accepted or rejected, as provided by the charter, and they all show an absence of the understanding by any one that they should destroy the existing or create a new corporation. This question was passed upon in the case of *Attorney General* v. *Joy*, 55 Mich. 107, where it was held that an act authorizing the Detroit & Pontiac Railroad to take a new name, and under that new name to extend its road from Pontiac to Lake Michigan, did not create a new corporation.

The general railroad law authorizes consolidation by all companies organized under it. We do not find it necessary to inquire whether the respondent could lawfully avail itself of those provisions if it were disposed. But, assuming that it might, has it done so by compliance with such provisions, or by a course of dealings which should be held to have had that effect? The law providing for consolidation clearly implies that the result of the statutory consolidation is a new corporation. See 1 How. Stat. § 3343. This is in accord with the majority of such statutes throughout the country, as will be seen by a comparison. Thomp. Corp. § 305. But this statute does not necessarily imply that the only arrangement for an extension of lines must come through a statutory consolidation, and other statutes permit arrangements of a different character to be made. We have already cited one, which was added to this charter by amendment. Laws 1855, Act No. 139. Undoubtedly, if a law points out a method by which railroads may consolidate, and provides that, upon compliance with such law, the consolidated companies shall constitute a new corporation, such new company could not deny the effect of its acts. It is not so clear that anything less than full or substantial compliance would enable it to claim new corporate rights. It is not

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to be presumed that consolidation is favored. On the contrary, it is usual for legislatures to hedge the privilege about with conditions that tend to the preservation and encouragement of competition, and prevent the sacrifice of public interests through monopolies. In Elliott on Railroads (section 323) it is said:

"These enabling statutes are construed to authorize a consolidation only in cases where the companies seeking to combine come fairly within the terms of the statute. * * * Where the statute provides for the mode of consolidation, that mode must be substantially, if not strictly, pursued."

See *Rodgers* v. *Wells*, 44 Mich. 411; *Mansfield, etc., R. Co.* v. *Drinker*, 30 Mich. 124; *Peninsular R. Co.* v. *Tharp*, 28 Mich. 506.

The intention to consolidate may be an important consideration where the act is ambiguous or uncertain, and in Elliott on Railroads (section 324) it is said that "a clear intention to consolidate, together with the performance of acts reasonably appropriate to that end, must be shown in order to establish a consolidation," where the act is consistent with a different intent. Thus, the union of name, officers, business, and property does not, it has been held, change their distinctive character as separate corporations. *Nashua & Lowell Railroad* v. *Boston & Lowell Railroad*, 136 U. S. 356. The mere purchase by one railroad corporation of the franchise and property of another does not make the purchaser the successor, by consolidation, of the purchased road. Thus, in the case before us, the numerous arrangements by which the respondent manages, owns, or is otherwise interested in its several branch lines, and which are not shown in the record, may not amount to a consolidation in a general sense, or, if they do so, not in the sense of the statute. Where the statute is silent in regard to the effect of consolidation, a new corporation is not always the necessary consequence. "Succession is not necessarily consolidation, and a corpora-

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tion may have authority to become the successor of another without having any authority to consolidate." Elliott, R. R. § 324. "If the merger is complete, it is evident that the one corporation is extinguished, *unless kept alive for certain purposes;* while it is equally clear that the other, in which it is merged, is not dissolved." Id. 335. See, also, Thomp. Corp. § 396, where it is said that the existence of a new corporation as the result of consolidation depends upon the legislative intent manifested in the statute under which the consolidation takes place. *Central Railroad & Banking Co.* v. *Georgia*, 92 U. S. 665. If there is no statute authorizing consolidation, the attempt is *ultra vires*. Elliott, R. R. § 322; Thomp. Corp. § 315, and cases cited. This case is unlike that of *Smith* v. *Railway Co.*, 114 Mich. 460. In that case the answer of the company to the order to show cause alleged that it had taken the steps prescribed by statute for the purpose of effecting a consolidation. In the present case there appears to be no such admission, and the record does not show that the Michigan Central has ever intentionally proceeded to effect a statutory consolidation. As said in Elliott on Railroads (section 335):

"The term 'consolidation' is an elastic one, and may include a union of two or more corporations into a new one, with a different name, with or without extinguishing the constituent corporations, or the merger of two or more corporations into another existing corporation under the name of the latter."

We have seen that the legislature has, by an amendment to the Michigan Central charter, authorized it to make business arrangements with other companies owning railroads. If so, it may enforce them. It may operate other roads, possibly buy their property or their stock. But if it be conceded that they cannot lawfully do these things, and therefore that their acts were *ultra vires*, are they not acts that subject them to a forfeiture of all rights through *quo warranto*, rather than a new grant of power

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under consolidation acts which they have neither attempted to act under nor complied with in making business arrangements with other roads? In the list of charges against this respondent are to be found the extension of lines by building, the operation of other roads, the acquisition of all of the stock of some or the owning of other roads, the leasing of others for long terms, the increase of capital. If these things are *ultra vires*, it does not follow that a consolidation has been effected, or, if so, that it is a statutory consolidation, which has created a new corporation. If, on the other hand, these are valid arrangements, and lack the substantial requisites of the consolidation provided by statute, the stockholders of the Michigan Central Railroad Company are not thereby deprived of their charter rights. They have never assented to a consolidation. The company could not, as a new corporation, enforce collection of stock subscriptions, and could not compel the State to recognize it as a new corporation.

The further claim is made that, granting all of the foregoing, Act No. 90, Pub. Acts 1891, is to be treated as an exercise of the power of amendment reserved in the charter, and must be accepted and acted upon, subject to the right of the respondent to collect its damages from the State. We think this cannot be. The act does not purport to be an amendment of the charter, and no provision for compensating the respondent is contained in it. There is no provision of law for the payment of such claim, and the respondent would be powerless to enforce it.

We therefore reach the conclusion that the respondent had a vested right to fix its own tolls, and that to hold the act of 1891 applicable to it would be to impair the obligation of the contract made between the State and the company. To bring this company under the power of the State in the matter of the regulation of tolls, if desirable, must be done by the method pointed out in the charter. It would doubtless be a convenience to the public to enjoy the privilege of travel upon this line at a two-cent rate, either under this act or the act discussed; but it cannot be

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accomplished, under this act, as to the line constructed under the original charter. The language of Mr. Justice Harlan in *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S. 673, is suggestive in this connection:

"If, in the judgment of the State, the public interests will be best subserved by an abandonment of the policy of granting exclusive privileges to corporations other than railroad companies, in consideration of services to be performed by them for the public, the way is open for the accomplishment of that result with respect to corporations whose contracts with the State are unaffected by that change in her organic law. The rights and franchises which have become vested upon the faith of such contracts can be taken by the public, upon just compensation to the company, under the State's power of eminent domain. [Citing cases.] In that way the plighted faith of the public will be kept with those who have made large investments upon the assurance by the State that the contract with them will be performed."

The order of the circuit court for the county of Wayne is reversed, with costs of both courts.

The other Justices concurred.

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FORT-STREET UNION DEPOT CO. *v.* COMMISSIONER OF RAILROADS.

1. STATUTES—AMENDMENT—OBJECT EXPRESSED IN TITLE—UNION DEPOT COMPANIES—TAXATION.

The general railroad law (Act No. 198, Laws 1873) is entitled "An act * * * to regulate the running and management, and to fix the duties and liabilities, of all railroad and other corporations owning or operating any railroad in this State." Section 3 of article 3 provides for the taxation of corporations subject to the act. By Act No. 228, Pub. Acts 1897, entitled "An act to amend section 3 of article 3 of Act 198,

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Session Laws of 1873, as amended, * * * entitled," etc., a radical change was made in relation to the rate of taxation, and union railroad station and depot companies, heretofore taxed under their organic act (Act No. 244, Pub. Acts 1881), were sought to be brought within the terms of said section 3 as amended. *Held*, that the act of 1897 did not contravene the constitutional provision (article 4, § 20) that no law shall embrace more than one object, which shall be expressed in its title, since the title of an amendatory act, which refers by chapter or section to the act amended, giving its title, will support any legislation that would have been permissible in the original act under such title, and a union depot company is a "corporation owning or operating a railroad," within the title of the act of 1873.

2. SAME—CONSTRUCTION—DOUBLE TAXATION—SLIDING SCALE.

Act No. 228, Pub. Acts 1897, amendatory of the general railroad law, provides that every railroad company and union railroad station and depot company shall pay a specific tax, to be computed in the following manner: "Upon all such gross income not exceeding $2,000 per mile of road actually operated within this State, 2½ per cent. of such gross income; * * * upon all such gross income in excess of $8,000 per mile of the road so operated, 5 per cent. thereof; that * * * union railroad station and depot companies whose earnings are in excess of $20,000 per mile shall pay on all such gross incomes in excess of $20,000 per mile of road so operated 10 per cent. thereof." *Held*, not to provide for a double taxation of depot companies as to their gross earnings in excess of $20,000 per mile, nor to exempt their earnings below that amount, but to require them to pay 5 per cent. upon gross earnings above $8,000 per mile and below $20,000, and 10 per cent. on earnings above $20,000 per mile.

3. UNION DEPOT COMPANIES — MILES OF ROAD OPERATED — HOW COMPUTED.

In determining the miles of railway operated by a union railroad station and depot company, for the purpose of the taxation of its gross income per mile, under Act No. 228, Pub. Acts 1897, there should be a separate measurement for each railroad running into its depot, provided it has as many tracks as there are roads, no two of which are used exclusively by any one road.

Mandamus by the Fort-Street Union Depot Company to compel Sybrant Wesselius, commissioner of railroads,

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to compute relator's tax according to the provisions of Act No. 244, Pub. Acts 1881. Submitted June 20, 1898. Writ denied October 3, 1898.

The amendatory act of 1897 (Act No. 228), referred to in the opinion, is as follows:

"SEC. 3. Every railroad company, and union railroad station and depot company, owning or operating any railroad situated in whole or in part in this State, shall, on or before the first day of July in each year, pay to the state treasurer, on the statement of the auditor general, a specific tax upon the property and business of such railroad corporation operated within the State, which tax shall be computed in the following manner, namely: Upon all such gross income not exceeding $2,000 per mile of road actually operated within this State, two and one-half per cent. of such gross income; * * * upon all such gross income in excess of $8,000 per mile of the road so operated, five per cent. thereof; that all gross income of union railroad station and depot companies whose earnings are in excess of $20,000 per mile shall pay on all such gross incomes in excess of $20,000 per mile of road so operated ten per cent. thereof. * * *"

Edward A. Gott (*Benton Hanchett*, of counsel), for relator.

Fred A. Maynard, Attorney General (*John Atkinson*, of counsel), for respondent.

HOOKER, J. In the year 1881 an act was passed by the legislature entitled "An act to authorize the incorporation of companies for the construction of union railroad stations and depots, with the necessary connecting tracks, and the management of the same." Act No. 244, Pub. Acts 1881 (1 How. Stat. § 3458 *et seq.*). The relator organized under the provisions of that act. Section 21 requires the payment, by companies organized under it, of an annual tax of 2½ per cent. upon their gross earnings, the same to be in lieu of all other taxes, with some immaterial exceptions. Previous to the enactment of this law,

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and at all times for many years both before and since, a general law providing for the organization of railroad companies has been in force. At the session of 1897 of the legislature an act was passed entitled:

"An act to amend section 3 of article 3 of Act 198, Session Laws of 1873, as amended by Act 45, Public Acts of 1879, as amended by Act 174, Public Acts of 1891, as amended by Act 129, Public Acts of 1893, entitled 'An act to revise the laws providing for the incorporation of railroad companies, and to regulate the running and management, and to fix the duties and liabilities, of all said roads, and other corporations owning or operating any railroad in this State,' approved May 1, 1873, being compiler's section 3360, Howell's Annotated Statutes of Michigan." Act No. 228, Pub. Acts 1897.

Act No. 198 of the Laws of 1873 (1 How. Stat. § 3313 *et seq.*) was entitled:

"An act to revise the laws providing for the incorporation of railroad companies, and to regulate the running and management, and to fix the duties and liabilities, of all railroad and other corporations owning or operating any railroad in this State."

Article 3 of said act is devoted to the subject of taxation; and section 3 provides that every company shall pay to the state treasurer, upon the statement of the auditor general, an annual tax upon its gross receipts, as therein specified. 1 How. Stat. § 3360. Section 1 requires every company to file a financial statement with the auditor general annually. In 1879, section 1 was amended, whereby it was made the duty of the railroad commissioner to file with the auditor general, annually, a computation of the tax upon such companies. Act No. 45, Pub. Acts 1879. In 1891 an amendment was made to section 3. The amended section provided that "every railroad company formed under the provisions of this act, or which now is or may hereafter be brought under the provisions of the general law of this State for the taxation of railway or railroad corporations, and every railroad company owning or operating any railroad, * * *

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shall pay a specific tax," etc. Act No. 174, Pub. Acts 1891. Act No. 129 of the Public Acts of 1893 again amends this section. We are not advised that there is anything in these various amendatory acts which affects the question before us. The law passed in 1897 made a radical change in section 3 of article 3 of the railroad law in relation to the rate of taxation. It also included union railroad station and depot companies, by the following language, viz.: "Every railroad company, and union railroad station and depot company, owning or operating any railroad," etc., shall pay, etc.

The record shows that the railroad commissioner has computed and reported to the auditor general the taxes claimed by him to be due from the relator in July, 1898, under the act last mentioned, and that this computation makes the tax chargeable against the relator much greater than it would be if computed under the provision of law existing prior to the enactment of the law of 1897; and its contention is that such is invalid to the extent that it is attempted to be applied to union railroad station and depot companies, it being claimed that the effect of this act is to make the relator taxable under the general railroad law, when it was not so taxable before, by an act which does not show such object in its title, and, further, that the act has two objects, viz., to increase the rate of taxation against railroad companies, and to bring union railroad station and depot companies under the general railroad law as to taxation, thereby repealing the section providing for taxation in the union railroad station and depot law.

We are of the opinion that it would have been competent for the legislature to bring all corporations owning or operating railroads within the provisions of the original act of 1873, without transgressing the rule that "a law shall have but one object," and that it could have been as lawfully done by enumerating their classes, or possibly their individual names, as by using the term "all companies operating railroads." Cooley, Const. Lim. (6th Ed.) 172. The relator is clearly a corporation operating a rail-

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road. As such, it is within the title of the original railroad law of 1873; but it is not within the language of the act as originally passed, either under section 3 of article 3 standing alone, which limited taxation to companies to be organized under that act, or as enlarged by section 13 of article 5, which made section 3 applicable to roads then existing under laws therein enumerated. Section 3 might have been made broader under the title, and included all corporations owning or operating railroads; and, if it might have been done originally under the title, we see no reason for denying the power of the legislature to do the same thing by amendment.

The important question is, What is requisite to the title of the amendatory act? Must it call attention to the fact that the scope of section 3 is to be enlarged, and mention the corporations to be included, either by name or generically, or must every one take notice that section 3 is liable to be amended in any particular, and to any extent, within the terms of the original title? This constitutional restriction upon the power of the legislature is not to be enlarged by construction. Cooley, Const. Lim. (6th Ed.) 175; *State* v. *Smith*, 35 Minn. 261. Many authorities support the rule that the title of the amendatory act is sufficient, and will support any legislation that would have been permissible under the original title when the law amended was enacted, if the amendatory act refer by chapter or section to the act amended, giving its title, although the practice has been criticised. Thus, in the case of *People* v. *Judge of Superior Court of Grand Rapids*, 39 Mich. 197, such an amendment was sustained, notwithstanding the title incorrectly stated the number of the section sought to be amended. In *People* v. *Gadway*, 61 Mich. 290 (1 Am. St. Rep. 578), Mr. Justice CHAMPLIN says: "In applying the constitutional test to this law, it must be regarded as if section 15 [Act No. 178, Pub. Acts 1883] was embraced in the original when passed; and, if it is embraced in the title of the act of 1881, it is valid; otherwise, not." It is fair to say that it is not clear that the exact ques-

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tion before us was discussed in that case, as apparently both court and counsel took it for granted that the case must turn upon the title to the original act. The case of *Holden* v. *Supervisors of Osceola Co.*, 77 Mich. 202, is also in point, Mr. Justice CAMPBELL saying: "It is undoubtedly competent to introduce, by amendment, anything which might have been introduced in the original act." The title to the act in that case, as in this, referred to a section, and not to the act. It was as follows: "An act to amend section 3 of Act No. 331," etc., "entitled," etc. Act No. 342, Local Acts 1889. The question was before this court again in *People* v. *Howard*, 73 Mich. 10. This was a criminal case, and the title was "An act to amend chapter 154 of the Revised Statutes of 1846, being chapter 180 of the Compiled Laws, entitled 'Of offenses against the lives and property of individuals.'" Act No. 116, Laws 1867. The object of this amendment was to create a new offense, and a felony at that; yet the law was held valid. The following cases from other States support the rule: *State* v. *Berka*, 20 Neb. 375; *State* v. *Algood*, 87 Tenn. 163; *State* v. *Ranson*, 73 Mo. 78; *Morrison* v. *Railway Co.*, 96 Mo. 602; *State* v. *Chambers*, 70 Mo. 625; *State* v. *Miller*, 100 Mo. 439. See, also, 23 Am. & Eng. Enc. Law, 281, and note 1, where many authorities are collected. We think the Michigan cases cited by counsel are distinguishable. The following cases appear to support their contention: *State* v. *Tibbets*, 52 Neb. 228 (66 Am. St. Rep. 492); *Tingue* v. *Village of Port Chester*, 101 N. Y. 294; *State* v. *Smith*, 35 Minn. 257.

It is said that, if it was proper to include depot companies within the amendment, it would have been as competent to include street-railway companies; but we think this does not necessarily follow. The act of 1873 had for its object the organization and maintenance of a well-known class of roads, and it may be that street railroads do not fall within that class; but, whether they do or not, it is obvious that the relator has to do with the identical

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kind of railroad that was provided for by that law. Its roads are exactly like the general railroads of the State in construction and equipment, and are designed to be operated in conjunction with them. We are of the opinion, therefore, that the act of 1897 was valid, and that the relator is within its terms.

It is also claimed upon the part of the relator that the provisions of this act should be so construed as to subject union railroad station and depot companies to no specific tax on gross earnings below $20,000 per mile. Our understanding of the act is that the sliding scale applies to both railroad and depot companies, and we think that in the case of the latter a fair construction would require the payment of 5 per cent. upon gross earnings above $8,000 per mile and below $20,000, and 10 per cent. above $20,000 per mile. If the strict letter of the act were to be followed, it may be, as claimed, that it would result in double taxation as to the excess over $20,000 per mile; but we think that immunity from taxation on earnings below that sum is not the only alternative, and that it is not reasonable to suppose that the legislature designed to exempt the gross earnings below $20,000.

It remains to inquire what was meant by the term "upon all such gross income not exceeding $2,000 per mile of road actually operated." To ascertain the number of miles of road operated by a railroad company, should the commissioner take the total linear measurement of all track, including double tracks and sidings, or the distance between *termini;* and, if the latter rule should be followed in cases of railroad companies, should any different rule apply as to union depot companies? The depot company has for its object the erection and management of a depot, wherein various roads approaching the city from different directions shall enter. To accomplish this, it is authorized to build connecting lines of railroad; and it is apparent that these connecting lines must diverge, and, in part at least, consist of separate tracks, running in different, if not opposite, direc-

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tions, instead of being parallel tracks upon one roadbed, as is ordinarily the case where double tracks or switches are put in by railroad companies. Justice would seem to demand that these separate tracks be treated as main lines, and that their aggregate of mileage should be returned. By this we do not mean that, where a single track is used by two companies, the length should be doubled; nor do we mean that, where a single railroad company is given exclusive use of a double track, both tracks should be measured; nor that switches should be treated as additional track, to be measured; but that the depot company should be entitled to the measurement of a line for each railroad running into its depot, provided it has as many tracks as there are roads, no two of which are used exclusively by any one road. The relator claims in its brief that its report shows that it has 4.575 miles of main tracks (though the petition shows less); the respondent, that it shows but 1.41 miles. We are unable to determine upon this record whether the computation of the railroad commissioner is justified by the facts or not, as we cannot determine the character of the track described in the return as "double track, main line," and "other tracks;" and the petition itself does not clearly show how much main line it has under our definition.

We think, therefore, that we should deny the writ, without prejudice to a further application if the commissioner shall decline to amend his computation to conform to the just rights of the relator under this opinion. No costs are allowed.

The other Justices concurred.

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MANISTEE & NORTHEASTERN RAILROAD CO. *v.* COMMISSIONER OF RAILROADS.

1. STATUTES—RAILROADS—EXEMPTION FROM TAXATION—GRATUITY.
   A statute extending to railroads building and operating lines within a specified territory a partial exemption from taxation does not create a contract, but confers a gratuitous privilege, revocable at the pleasure of the State.

2. SAME—SUFFICIENCY OF TITLE.
   That the title of an act is not broad enough to cover certain provisions thereof does not invalidate the act as to other and independent provisions.

3. SAME—REPEAL.
   The repeal by Act No. 228, Pub. Acts 1897, of the partial exemption from taxation extended to certain railroad companies by Act No. 174, Pub. Acts 1891, and Act No. 129, Pub. Acts 1893, does not deprive such companies of their exemption up to the time the repealing act took effect.

Mandamus by the Manistee & Northeastern Railroad Company to compel Sybrant Wesselius, commissioner of railroads, to exclude a part of its road in computing the amount of its taxes. Submitted June 20, 1898. Writ granted October 3, 1898.

Act No. 174, Pub. Acts 1891, and Act No. 129, Pub. Acts 1893, provided for the taxation of railroads, and contained the following exemption clause:

"*Provided, further*, that the rate of taxation fixed by this act, or any other law of this State, shall not apply to any railway or railroad company hereafter building and operating a line of railroad within this State north of parallel 44 of latitude, until the same has been operated for the full period of 10 years, unless the gross earnings shall equal $4,000 per mile, except in so far as said line so built shall extend south of said parallel; but no such company shall be entitled to the immunity from taxation herein provided, when the same is owned, leased, or operated by

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existing companies, until the report of earnings to the commissioner of railroads required by the laws of this State, containing the earnings of such lines hereafter built, separate and distinct from the earnings of existing lines, shall be made and filed."

This exemption clause was repealed by Act No. 228, Pub. Acts 1897. The relator was organized, and the greater part of its road constructed, prior to 1891. After the passage of that act, it extended its line from the village of Lake Ann to Traverse City, and constructed a branch 3½ miles long, known as the "Glen Arbor Branch." The respondent, under the act of 1897, computed the amount of tax upon the gross earnings of the entire road. The relator asks for the writ of *mandamus* to compel the respondent to make a new computation, leaving out that part of its road constructed after the passage of the act of 1891.

M. J. Smiley, for relator.

Fred A. Maynard, Attorney General (*John Atkinson*, of counsel), for respondent.

GRANT, C. J. (*after stating the facts*). The relator contends:

(1) That by the extension of its road it accepted the proposition made by the State, and that thereby a contract exists between the corporation and the State, which a subsequent legislature cannot avoid by a repeal of the law.

(2) That the exemption was valid until repealed; that the repeal did not take effect till August 30, 1897; and that the company was therefore exempt from taxation until that date, even if the repeal be held valid.

(3) That the law of 1897 is unconstitutional and void, in that it embraces two subjects, one of which is not expressed in the title.

1. The question whether such a statute creates a contract, or confers a gratuity or bounty or privilege, existing *bene placitum*, is no longer debatable. It is settled by a long line of decisions that they are mere gratuities. The

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essential element of a binding contract, viz., a consideration, is wanting. The question is ably and fully discussed in the following cases: *East Saginaw Manfg. Co.* v. *City of East Saginaw*, 19 Mich. 259 (2 Am. Rep. 82); *Welch* v. *Cook*, 97 U. S. 541; *Tucker* v. *Ferguson*, 22 Wall. 527; *Grand Lodge F. & A. Masons of Louisiana* v. *City of New Orleans*, 166 U. S. 143; *West Wisconsin R. Co.* v. *Board of Supervisors*, 93 U. S. 595. The *East Saginaw Manfg. Co. Case* was affirmed by the United States Supreme Court, in 13 Wall. 373.

The reasoning of these decisions is so clear and cogent that it would be useless to attempt to improve upon it. I call special attention to the opinion of Mr. Justice COOLEY in the *East Saginaw Manfg. Co. Case*, and to the language of Mr. Justice Swayne in the *Ferguson Case*, on pages 573 to 575. There is no real difference in meaning between the language of the act involved in the *East Saginaw Manfg. Co. Case* and that in the present case, except that the former was unlimited in time, while in this it is limited. But time does not determine the character of the transaction, or change a gratuity into a contract. There was a time limit in *Welch* v. *Cook*, *Tucker* v. *Ferguson*, and *West Wisconsin R. Co.* v. *Board of Supervisors*. We have examined the cases cited in behalf of relator: *State Bank of Ohio* v. *Knoop*, 16 How. 369; *Wilmington Railroad* v. *Reid*, 13 Wall. 264; *Home of the Friendless* v. *Rouse*, 8 Wall. 438; *Farrington* v. *Tennessee*, 95 U. S. 679; *University* v. *People*, 99 U. S. 309. They are not in conflict with the holding of the other cases cited. They were all rendered by the same court, and illustrate the distinction between a gratuity and a contract. In *Com.* v. *Essex Co.*, 13 Gray, 239, the consideration is clearly pointed out at page 253 of the opinion. The company, under its act of incorporation, had constructed a dam with a fishway according to its charter, and had paid all parties damnified in their several fisheries large sums of money. It was held that this was a contract which could not be repealed.

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2. The body of the act of 1897 contains a clause taxing union railroad station and depot companies, which are organized under another act. The title contains no reference to the latter. It is unnecessary to consider whether the act is void as to those companies. The title of the act is sufficient as applied to railroads, and the provision in regard to station and depot companies is entirely distinct from that in regard to railroads. In such cases the act is void only as to those matters not contained in the title. 23 Am. & Eng. Enc. Law, 232, 270; *Ames* v. *Port Huron, etc., Booming Co.*, 6 Mich. 266; *Board of Sup'rs of Sanilac Co.* v. *Auditor General*, 68 Mich. 659; *Schehr* v. *City of Detroit*, 45 Mich. 626. The point, however, is disposed of in the opinion in *Fort-Street Union Depot Co.* v. *Commissioner of Railroads*, *ante*, 340.

3. The respondent was in error in holding that relator was not entitled to its exemption until the repealing act took effect. The exemption was good, and the right to it was vested, until repealed. *People* v. *Board of State Auditors*, 9 Mich. 327; *Welch* v. *Cook*, *supra*.

The writ is granted, directing respondent to compute the amount in accordance with this opinion.

The other Justices concurred.

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MARDIAN v. WAYNE CIRCUIT JUDGE.

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1. RECEIVERS—DIVESTITURE OF POSSESSION—APPEALABLE ORDERS.
An order appointing a receiver, whereby the possession of property is divested, is appealable.

2. SAME—MANDAMUS.
Such order being appealable, *mandamus* will not lie to set it aside.

Mandamus by Rudolph Mardian to compel Sherman B. Daboll, acting circuit judge of Wayne county, to vacate an order appointing a receiver. Submitted June 7, 1898. Writ denied October 3, 1898.

William F. Connolly, for relator.

Walters & Walters, for respondent.

HOOKER, J. This is an application for a *mandamus* to compel the vacation of an order appointing a receiver. It has been repeatedly held that orders appointing receivers, whereby the possession of property is divested, are appealable. See *Barry* v. *Briggs*, 22 Mich. 201; *People* v. *Jones*, 33 Mich. 303; *Taylor* v. *Sweet*, 40 Mich. 736; *Morey* v. *Grant*, 48 Mich. 330; *Perrin* v. *Lepper*, 56 Mich. 351.

It is a well-settled rule that *mandamus* will not lie when there is another adequate remedy. The following Michigan authorities will be found to sustain this rule: *People* v. *Jackson Circuit Judges*, 1 Doug. 302; *People* v. *Wayne County Court Judge*, 1 Mich. 359; *People* v. *Wayne Circuit Judge*, 19 Mich. 296; *People* v. *Allegan Circuit Judge*, 29 Mich. 487; *O'Brien* v. *Tallman*, 36 Mich. 13; *Stall* v. *Diamond*, 37 Mich. 429; *Olson* v. *Muskegon Circuit Judge*, 49 Mich. 85; *Delhi School Dist.* v. *Ingham Circuit Judge*, Id. 432; *Lloyd* v. *Wayne Circuit*

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Judge, 56 Mich. 236 (56 Am. Rep. 378); *Perrin* v. *Lepper*, 56 Mich. 351; *Scott* v. *Wayne Circuit Judges*, 58 Mich. 314; *Burt* v. *Wayne Circuit Judge*, 82 Mich. 251; *Eyke* v. *Lange*, 90 Mich. 592, 104 Mich. 26; *Corby* v. *Wayne Probate Judge*, 96 Mich. 11; *Thomas* v. *Wayne Circuit Judges*, 97 Mich. 608 (McGrath, Mand. Cas. No. 853); *Hall* v. *Wayne Circuit Judge*, 111 Mich. 395; *Aldrich* v. *Wayne Circuit Judge*, Id. 525.

In the case of *Hall* v. *Wayne Circuit Judge* we applied the general rule, and held that an order exactly like the one before us was appealable, and refused to compel its vacation by *mandamus*, although clearly improvident. In that case we cited the case of *Scott* v. *Wayne Circuit Judges* as directly in point. The same disposition of a similar case is found in *Thomas* v. *Wayne Circuit Judges*, 97 Mich. 608 (McGrath, Mand. Cas. No. 853).

The writ is denied, with costs.

The other Justices concurred

DEVINE *v.* WAYNE CIRCUIT JUDGE.

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MANDAMUS—ORDER APPOINTING RECEIVER.

Case ruled by *Mardian* v. *Wayne Circuit Judge, ante*, 353.

Mandamus by Edward D. Devine to compel Sherman B. Daboll, acting circuit judge of Wayne county, to vacate an order appointing a receiver. Submitted June 7, 1898. Writ denied October 3, 1898.

Jasper C. Gates, for relator.

Walters & Walters, for respondent.

PER CURIAM. This case is ruled by the decision in the case of *Mardian* v. *Wayne Circuit Judge, ante*, 353.

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OCTOBER TERM, 1898.

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LIEBERMAN *v.* SLOMAN.

1. EQUITY—DEMURRER—REMEDY AT LAW.
   A bill to restrain defendant from prosecuting an action at law against complainant growing out of a purchase of land on their joint account, which sets up defendant's fraudulent conduct with respect to the purchase, avers that the land is held by complainant as trustee, and asks that an account be taken, and a decree rendered establishing the respective rights and interests of the parties, and that the necessary conveyances be directed,—is not demurrable on the ground that complainant's remedy at law is adequate.

2. SAME—AVERMENT OF JURISDICTION—EFFECT OF OMISSION.
   If the case made by a bill is clearly of equitable jurisdiction, the court will sustain it, although the formal allegation that complainant has not an adequate remedy at law is omitted.

Appeal from Wayne; Donovan, J. Submitted June 10, 1898. Decided October 18, 1898.

Bill by John P. Lieberman against Eugene H. Sloman for an accounting. From an order overruling a demurrer to the bill, defendant appeals. Affirmed.

Chamberlain & Guise (*John J. Speed*, of counsel), for complainant.

Sloman & Groesbeck, for defendant.

MONTGOMERY, J. This is an appeal from an order overruling a demurrer to a bill in equity. The brief of the counsel for the complainant states the facts and law so clearly that we quote from it at length:

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"The case as made by the bill is, briefly stated, as follows: The parties, at the solicitation of the defendant, entered into a purchase on joint account of certain real estate. A portion of the purchase price was secured by mortgages upon the property, and, of the balance, a portion was to be paid by complainant and the remainder by defendant. The property was purchased in the name of the defendant, and he represented to complainant that the purchase price was very much larger than it actually was; and upon such representation the complainant was induced to advance $7,400 as his share of the purchase price, when in fact the entire balance above the mortgages did not exceed $6,029, the difference between this sum and the $7,400 being retained by the defendant; the defendant further representing that, in addition to the $7,400 advanced by complainant, he (defendant) had paid on account of the purchase, and as his share of the advanced payment, the sum of $1,400. It was agreed that defendant should convey to complainant the land, to be held by him in trust, and the conveyance was made, and a written agreement was made, which recited the making of the purchase in the name of complainant, and agreed that complainant would make certain advances of expenses and taxes and the amount payable to the mortgagees, and the defendant should take charge of the platting, improvement of the property, and the sale of lots, the amount received from sales to be applied to the payment of expenses, the payment of the mortgages, and the repayment of the advances made by each of the parties, with interest at 7 per cent., and the balance divided equally between the parties. It was further agreed: 'And, in case the land shall not be sold within five years, then the advances of the parties hereto shall be adjusted, computing interest at 7 per cent., so that each shall have contributed one-half of all sums paid on account of the same, and thereafter the land shall be owned in common, and all liabilities shared equally; the intention being that all losses and gains shall be shared equally.'

"The bill further alleges that, since the making of this agreement, the complainant has paid out for interest and taxes the sum of $4,596.07, and the defendant claims he has advanced moneys on account of the lands to an amount exceeding $2,300, and has commenced a suit at law to recover from complainant the amount of such advances, claiming that the agreement has been canceled by mutual

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consent, but which pretenses have no foundation in fact; that the mortgages have not been paid, and are due; that five years have elapsed since the purchase and making of said agreement, and the land has not been sold as provided by the agreement; and the complainant claims that he is entitled to have the advances made by each party adjusted, and such advances made by each over and above the sum contributed by the other party repaid, so that each shall have contributed one-half of the sums paid, and thereafter the lands owned in common, as provided in the clause of the agreement recited above. The complainant acknowledges that he holds the lands in trust, and he offers to convey, upon adjustment of the accounts, one-half of the property to defendant.

"The bill prays that an account may be taken; that the representations made by the defendant as to the purchase price be decreed to be fraudulent; that the aggregate amount actually advanced by each party be ascertained, and contributions made to equalize such advances, the liabilities adjusted as between themselves, the respective rights and interests of each party in the lands be ascertained and decreed, and the defendant restrained from prosecuting his action at law against the complainant. To this bill of complaint the defendant filed a demurrer, claiming that the complainant has not made a case entitling him to relief in a court of equity, and that he has a complete and adequate remedy at law.

"The bill does not merely seek to obtain an account between the parties, nor to establish a defense to an action at law, but to obtain a decree establishing the rights and interests of the parties in real estate which is now held by the complainant as trustee, and that the necessary conveyances in accordance with such determination be made. It is obvious that a court of law cannot deal with the entire subject-matter, and that a court of equity can alone do justice to the parties in relation to their respective rights, not only as between themselves in the matter of the accounts, but in respect to their interest in the lands, and the conveyances or releases which should be decreed. Provision should also be made with reference to the liability upon the mortgages. The remedy at law is not only wholly inadequate, but incomplete. See *Blodgett* v. *Foster*, 114 Mich. 688.

"It is not necessary to make the formal allegation that the complainant has not a complete and adequate remedy

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at law. It is a mere superfluity. The facts stated confer the jurisdiction. Story, Eq. Pl. § 34."

The order appealed from will be affirmed, and the case remanded for further proceedings.

The other Justices concurred.

E. H. CHASE & CO. *v.* WAYNE CIRCUIT JUDGE.

ATTACHMENT FOR DEBT NOT DUE—SUFFICIENCY OF AFFIDAVIT.

An affidavit for attachment, which sets up the surreptitious transfer from defendant's place of business to a private residence of a portion of a stock of goods purchased from plaintiff on credit, the disposition of others to personal friends financially irresponsible, the mortgaging of the stock to its full value, and the false representation to other creditors that plaintiff's claim had been paid,—is sufficient to authorize the issuance of the writ, under 3 How. Stat. § 8016*a*, before the maturity of the debt.

Mandamus by E. H. Chase & Company to compel Joseph W. Donovan, circuit judge of Wayne county, to vacate an order quashing a writ of attachment. Submitted October 4, 1898. *Mandamus* granted October 18, 1898.

Counsel for relator, in their brief, give the substance of the affidavits for attachment, as follows:

"(*a*) That the defendant, Kaufman, was indebted to the relator in the sum of $1,136.

"(*b*) That relator had good reason to believe that defendant was guilty of the several acts of fraud incorporated in the affidavits, admissible under the statute in reference to a debt due.

"(*c*) That on February 12th Kaufman had executed two chattel mortgages,—one to Mihalovitch, Fletcher & Co., for $1,231.24, and one to A. J. Groesbeck, as trustee for certain creditors, for $349.18.

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"(*d*) That on February 12th affiant was at Kaufman's place of business, and that a large part of the goods sold by his firm were of recent purchase, yet that deponent was able to find but a small portion of the goods at such place.

"(*e*) That the stock of goods of Kaufman would not exceed from twelve to fifteen hundred dollars.

"(*f*) That outside of the indebtedness of $1,231.24 to Mihalovitch, Fletcher & Co., and $349.18 to Groesbeck, and $1,136 to relator, Kaufman had other debts, to his knowledge, aggregating $2,989.59.

"(*g*) That affiant had been informed by a brother of defendant that his outstanding indebtedness was from twelve to fifteen thousand dollars.

"(*h*) That Kaufman, at an early hour in the morning of February 12th, had taken a wagon loaded with three barrels of whisky, and 20 new kegs, and a number of cases of liquors and wines, to the rear of the private residence of one Sol. Kaufman, on Mullet street.

"(*i*) That on February 12th affiant went to the store of one Joseph Neiderlander, a friend of Kaufman, and financially irresponsible, and found a portion of his goods at the store of said Neiderlander, who claimed to have bought them.

"(*j*) That affiant had made an investigation, and could find no goods or property of Kaufman, real or personal, outside of that contained in his store or in Neiderlander's store, and in the private residence of Sol. Kaufman.

"(*k*) Robert Schlesinger's affidavit also accompanied the application. He showed that in December, 1897, and January and February, 1898, his firm, of Rosenthal & Sons, sold goods to Kaufman; that, as an inducement to such sale, Kaufman represented that he had discounted the bills of Chase & Co., and that he owed no one, of any consequence, outside of the firm of Mihalovitch, Fletcher & Co.

"(*l*) Schlesinger's affidavit further showed that he had had frequent conversations with Kaufman, and that, besides the amounts embraced in the mortgages to Mihalovitch, Fletcher & Co. and Groesbeck, he knew that Kaufman owed certain bills, amounting in the aggregate to over $4,000.

"(*m*) Further, that he had frequently been in the business place of Kaufman, and was familiar with the approximate value of the stock of goods in that store, and that, in

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his opinion, they would not exceed in value from twelve to fifteen hundred dollars.

"(*n*) Henry Look's affidavit also accompanied the application, and showed that he was deputy sheriff; that a writ of attachment was placed in his hands on February 12th; that he went with the writ to the house 112 Mullet street, where he had been informed that some portion of Kaufman's goods had been taken; that upon arriving there he discovered in the alley, in the rear, a wagon containing three barrels of whisky; that he thereupon attached the same; and that said 112 Mullet street was a private residence."

Warner, Codd & Warner, for relator.

Sloman & Groesbeck, for respondent.

MOORE, J. This is an application to require the circuit judge to vacate an order quashing a writ of attachment issued in a suit wherein relator is plaintiff and Abraham B. Kaufman is defendant. The debt from defendant was not due at the time the writ was sued out. It is claimed on the part of the respondent that the writ was properly quashed; citing *Howell* v. *Muskegon Circuit Judge*, 88 Mich. 361, and *McCrea* v. *Muskegon Circuit Judge*, 100 Mich. 375. The writ of attachment was based upon three affidavits. These affidavits, in addition to showing such facts as would have been sufficient, if the debt had been due, to entitle the relator to the writ, showed in detail such facts and circumstances as to establish, by a reasonable and logical inference, fraud upon the part of the defendant, and showed the necessity for the issuance of the writ of attachment before the debt came due. These affidavits supplied the proof of facts and circumstances which were lacking in the case of *Howell* v. *Muskegon Circuit Judge*, *supra*, and *McCrea* v. *Muskegon Circuit Judge, supra*. We think the affidavits comply with the requirements of the statute (3 How. Stat. § 8016*a*), as construed in *Mosher* v. *Bay Circuit Judge*, 108 Mich. 503.

The writ will issue as prayed.

The other Justices concurred.

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In re CHUDEK.

1. INSANITY—PETITION—VERIFICATION.
   A petition under Act No. 120, Pub. Acts 1897, to have a person adjudged insane by the probate court, need not be verified.

2. SAME—INDIGENT INSANE—APPEAL.
   Act No. 120, Pub. Acts 1897, amending section 21 of the general law respecting asylums for the insane (3 How. Stat. § 1930*a et seq.*), provides for an appeal "in all cases or proceedings arising under this act." *Held*, that the right of appeal is not limited to cases arising under section 21, which relates to persons not in indigent circumstances, but extends to proceedings under section 23, which treats of indigent insane.

Certiorari to Wayne probate court; Willard M. Lillibridge, acting judge. Submitted October 4, 1898. Decided October 18, 1898.

Ida Chudek was adjudged insane, and committed to the Eastern Michigan Asylum, at Pontiac. Upon an appeal being denied to her, she sued out writs of *certiorari* and *habeas corpus*. Petitioner discharged.

James H. Pound, for petitioner.

Allan H. Frazer, Prosecuting Attorney, and *Byron S. Waite*, Assistant Prosecuting Attorney, for the people.

MONTGOMERY, J. The petitioner was adjudged insane by the probate court of Wayne county, Judge Lillibridge, of the Wayne circuit court, sitting in place of Judge Durfee, who was himself the petitioner. After an adjudication of insanity, the petitioner made application to appeal to the circuit court. A bond was presented to Judge Donovan, acting as probate judge, and approved, but, after consideration, Judge Donovan directed the probate

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register not to receive the bond, for the reason that, in his view, the order was not appealable. The petitioner has now sued out a writ of *habeas corpus*, and also a writ of *certiorari*, and asks a review of the proceedings, claiming: *First*, that the proceedings resulting in the adjudication of insanity were fatally defective; and, *second*, that she is entitled to be enlarged, because an appeal was regularly taken, and was authorized by statute.

1. The claim is made that the court did not obtain jurisdiction, for the reason that the petition which set the court in motion was not verified. The statute (Act No. 120, Pub. Acts 1897) does not require a verification of the petition. Counsel cites, as sustaining his contention, the case of *Lindsay* v. *Huth*, 74 Mich. 712; but that case was decided distinctly upon the ground that the statute required the notice which was in question to be verified.

2. Under the law as it existed prior to 1897, no appeal was allowed from a determination of insanity. *Sparrow* v. *Ingham Circuit Judge*, 109 Mich. 272. In 1897 the legislature, by Act No. 120, amended section 21 of the act entitled "An act to amend, revise, and consolidate the laws organizing asylums for the insane," etc. (3 How. Stat. § 1930*a et seq.*), and provided for an appeal. The question is whether such appeal is limited to cases arising under section 21, or whether it was the intention to authorize an appeal in all cases. The present proceeding is under section 23 of the act, relating to persons in indigent circumstances. Section 21 relates to all other persons alleged to be insane. The purpose of discriminating against persons in indigent circumstances should not be lightly imputed to the legislature. The grant of an appeal was, doubtless, deemed an added safeguard against the restraint of sane persons in an asylum. Certainly, the restraint of an indigent person who is wrongly adjudged insane is as unfortunate as the restraint of one in better circumstances. The language of the statute is, "In all cases or proceedings arising under *this act*, any person aggrieved by any order, sentence," etc., "may appeal

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therefrom." This language became a part of section 21, and section 21 was a part of the complete act. The amendment should be read as though it was a part of the original act. When so read, the language is not such as to limit the appeal to cases arising under section 21, but applies to all cases under the act. We think the appeal should have been allowed, and, as it was duly perfected, the petitioner should be discharged from custody.

The other Justices concurred.

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McCARTHY *v.* KENT CIRCUIT JUDGE.

WATER-CRAFT ACT—COLLISIONS—ADVISORY VERDICT.

2 How. Stat. § 8261, provides that "all cases of * * * collision * * * arising under this act [water-craft act] shall be determined upon the trial or hearing, and upon appeal, according to the principles established in courts of admiralty and maritime jurisdiction in such cases." Section 8281 provides that "the proceedings and practice under this act shall be the same as in personal actions at law, except as herein otherwise provided, so far as the same may be applicable." Section 8259 provides that the trial shall be "by the court without a jury, unless a jury be demanded." *Held*, that the findings of a jury in cases of collision are merely advisory.

Mandamus by Michael G. McCarthy to compel William E. Grove, circuit judge of Kent county, to enter judgment in proceedings under the water-craft act in accordance with the findings of a jury. Submitted October 4, 1898. Writ denied October 18, 1898.

Two steamboats, the Major A. B. Watson and the Trixie, both pleasure boats, collided on Reed's Lake. The Trixie was injured. Her owner, the relator, brought

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suit against the Watson under the water-craft act (2 How. Stat. chap. 285). Suit was commenced by filing a complaint, to which the owner of the Watson filed an answer. Relator demanded a jury, which was ordered. The parties, by consent, agreed to six special questions to be answered by the jury. They were not required to, and did not, render a general verdict. To the first question the jury found that the Watson was at fault for the collision; to the second that the Trixie was not at fault; to the third that the Trixie could not, by reasonable care, have avoided the collision; to the fourth that the damage to the Trixie was $162.50; to the fifth that the Trixie could have earned during the remainder of the day, but for the collision, $50; to the sixth that the Watson could have avoided the collision by the use of reasonable care. Relator moved the court for judgment on the findings of the jury. The court refused to accept the findings of the jury as conclusive, but only advisory, and found from the evidence that both boats and their masters were equally at fault for the collision, and that each should bear one-half of the damage suffered by the Trixie, and that neither party should recover costs, and entered a judgment upon the bond which had been given for $106.25.

Charles O. Smedley and *L. E. Carroll*, for relator.

More & Wilson, for respondent.

GRANT, C. J. (*after stating the facts*). Was the verdict of the jury conclusive and binding upon the court? This is the sole question presented. The statute provides that a "trial or hearing shall be by the court without a jury, unless a jury be demanded by either party." Section 8259. Section 8261 is as follows:

"All cases of general average, salvage, and collision, and all cases relating to sailors' wages or to the employment of seamen, arising under this act, shall be determined upon the trial or hearing, and upon appeal, accord-

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ing to the principles established in courts of admiralty and maritime jurisdiction in such cases."

It is also provided:

"The proceedings and practice under this act shall be the same as in personal actions at law, except as herein otherwise provided, so far as the same may be applicable." Section 8281.

We think that section 8261 is conclusive against the contention of the relator. It provides that all cases of collision, whether upon trial or appeal, shall be determined according to the principles established in courts of admiralty and maritime jurisdiction. Cases arising under this section come within the exception mentioned in section 8281. It was said in the case of *The Empire*, 19 Fed. 560:

"In chancery cases, the province of the jury is said to be to 'enlighten the conscience of the court;' and, as the court of admiralty is but the chancery of the seas, I see no reason why we should not give it the same effect here."

Under a much more stringent provision it was held that the verdict of the jury in an equity case was simply advisory. *Basey* v. *Gallagher*, 20 Wall. 670. See, also, *The City of Toledo*, 73 Fed. 220; *Dunn* v. *Dunn*, 11 Mich. 284; *Brown* v. *Kalamazoo Circuit Judge*, 75 Mich. 274 (5 L. R. A. 226, 13 Am. St. Rep. 438). The verdict of a jury is only advisory in cases of accounting by administrators, executors, and guardians. *In re Pfeffer's Estate*, 117 Mich. 207.

There are other provisions of the water-craft law which throw some light upon the question. The court may refer any matter, during the progress of the cause, to an attorney or circuit court commissioner, to take evidence, and report the same to the court, with his opinion thereon; but his opinion shall not be binding on the court. Section 8260. So, in the case of an appeal to the Supreme Court, the case is heard *de novo*, and either party may take additional testimony, and the

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court shall enter such judgment or decree as shall be just. Sections 8270–8274. If the verdict of the jury is conclusive in the circuit court, it ought, for the same reason, to be conclusive in the appellate court. The legislature could not have intended that the verdict should be conclusive in one court and not in the other. A statutory provision which would lead to such a result must be so clear as to leave no doubt as to its meaning.

The writ is denied, with costs.

The other Justices concurred.

POST *v.* VOORHEES.

1. TRIAL—INSTRUCTIONS NOT BASED ON EVIDENCE.
   Where plaintiff in his pleadings based his claim upon an alleged sale of property at a specified price, and presented his proofs on that theory, an instruction that, if the jury should find that defendant was to take the property and dispose of it, and account to plaintiff after deducting an amount due, and that the value of the property was not agreed upon, the jury might fix its value, and render judgment for the balance, was erroneous.

2. SAME—ACTION ON CONTRACT—EVIDENCE OF REASONABLENESS.
   A party who declares upon a contract cannot support it by evidence of its reasonableness until the adverse party has attacked it as unreasonable.

3. SAME—IRRELEVANT TESTIMONY—DUTY TO EXCLUDE.
   In an action to recover the purchase price of property, evidence by the plaintiff regarding his purchase of the same, and the amount of money he then had, which had no bearing upon the question whether or not the contract sued on was executed, should have been excluded.

4. SAME—INCONSISTENT CONTENTIONS.
   A claim that deeds and a bill of sale executed by the plaintiff to the defendant were mortgages, and that the plaintiff's

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remedy was by foreclosure, is inconsistent with a plea admitting a sale of the property, and with the introduction in evidence by the defendant of a written release of all interest in the land, executed by the plaintiff.

Error to Gratiot; Daboll, J. Submitted October 4, 1898. Decided October 18, 1898.

Assumpsit by Philemon H. Post against Jacob A. Voorhees upon an alleged contract of sale. From a judgment for plaintiff, defendant brings error. Reversed.

Plaintiff's declaration contains the common counts in *assumpsit*, and a special count alleging the sale of certain described lands by the plaintiff to the defendant for what they were reasonably worth, and alleges their value to be $3,000. Defendant demanded a bill of particulars, which was furnished, containing various items of personal property, stock, and farm implements, aggregating $792.25. Defendant demanded a more specific bill of particulars, and also a more particular statement of the transaction contained in the special count. Plaintiff furnished an additional bill of particulars, containing a long list of the personal property, without any value attached, and then specifically set forth an agreement that the land, which was a farm, and the personal property, were agreed to be worth the sum of $4,000, and that, in consideration of the sale, transfer, and delivery of the same to the defendant, he (the defendant) had agreed to pay plaintiff therefor the sum of $4,000. The defendant, with his plea of the general issue, denied any such agreement, claimed a full and complete settlement, and that the land and personal property were conveyed to him for the amount he had advanced to plaintiff, and for which he held a mortgage upon the land for $1,300, and chattel mortgages upon the personal property for other sums. The total of plaintiff's indebtedness to Voorhees was $2,460.74. The jury rendered a verdict for plaintiff for $1,121.12. Plaintiff's counsel, in opening his case to the jury, based his claim

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for recovery upon the contract for $4,000, less the amount due from plaintiff to defendant, and plaintiff testified to it.

J. Lee Potts (*Cahill & Wood*, of counsel), for appellant.

John T. Mathews (*W. A. Bahlke*, of counsel), for appellee.

GRANT, C. J. (*after stating the facts*). 1. In one portion of his charge the learned circuit judge instructed the jury that, if they should find the arrangement to be that defendant was to take the property, and dispose of it, or keep it, and account to plaintiff for the balance after paying what was due defendant, and the value of the property was not agreed upon, the jury might fix the value, deduct the amount due from plaintiff, and render judgment for the balance. Evidently the jury adopted this theory, for, if they found the contract as stated by the plaintiff, he was entitled to recover over $1,500. There was only one theory upon which the plaintiff could recover under his pleadings and proof, and that was a sale at the agreed price of $4,000. The above instruction was therefore erroneous.

2. Plaintiff was permitted on his case in chief to state the value of the land and of the items of personal property sold. This was not competent. If the defendant had introduced evidence tending to show that the value of the property was very much less than the price plaintiff claimed was agreed upon, for the purpose of showing the improbability of the contract, plaintiff would, of course, have been entitled to rebut it. But a plaintiff cannot support his contract by evidence of its reasonableness until the defendant has attacked it as unreasonable.

3. Plaintiff was permitted to testify to his purchase of this 80 acres, the amount of money he then had, and certain dealings between him and the defendant. These things had no bearing upon the question whether or not the contract plaintiff relied upon was made, and should

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have been excluded. Some of them might very naturally tend to prejudice the jury against the defendant.

4. It is claimed by the defendant that the deeds and a bill of sale executed by plaintiff to defendant were in fact mortgages, and that plaintiff's only remedy was in a court of equity to foreclose them. This claim is inconsistent with the defendant's plea and notice. Both parties, by their pleadings, admitted a sale of the real and personal property, and defendant introduced a written release of all interest in the land, executed by plaintiff. The case was properly left to the jury upon this point.

Judgment reversed, and new trial ordered.

The other Justices concurred.

CARLAND v. WESTERN UNION TELEGRAPH CO.

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1. PLEADING—JOINDER OF COUNTS.
   A special count in *assumpsit* may be joined with the common counts.

2. SAME—ELECTION.
   Where the common counts were practically abandoned, there being nothing in the case to support them, it was not necessary to compel an election of counts.

3. TELEGRAPH COMPANIES — FAILURE TO TRANSMIT MESSAGE — ACTION FOR DAMAGES—ASSUMPSIT.
   An action by the sender of a telegram against the company to recover damages for failure promptly to transmit and deliver the message may be brought in *assumpsit*.

4. SAME—RULES AND REGULATIONS—NOTICE TO SENDER.
   The sender of a telegram is bound by the rules and regulations under which the company transmits messages only so far as they are brought to his knowledge.

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5. SAME—PRESUMPTION OF NOTICE.
There is no presumption that business men are acquainted with the conditions usually imposed upon patrons by telegraph companies.

6. SAME—TELEPHONING MESSAGE TO OPERATOR.
An operator of a telegraph company is the agent of the company in receiving over a telephone a message to be transmitted by the company, in the absence of any showing that the company forbade such practice, or that, if it was forbidden, the sender had notice of such regulation.

7. SAME—CIPHER MESSAGES—INTERPRETATION.
The meaning of a cipher telegram may be shown by the sender in an action by him against the company for failure promptly to transmit the same.

8. SAME—NONDELIVERY—ADMISSIONS OF OPERATOR.
A statement by a telegraph operator to the sender of a message, that it has not been delivered, made as a report of his efforts to trace the telegram, is admissible, as against the telegraph company, to show the fact of nondelivery.

9. EVIDENCE—QUESTION FOR JURY.
Testimony of a witness that he knew the price of wheat at C. on a certain day, where his cross-examination did not show that he had no knowledge on the subject, was sufficient to justify the court in submitting the question of such price to the jury.

10. CONTRACTS—DEALINGS IN FUTURES—WHEN VALID.
Plaintiff, in January, telegraphed his broker in Chicago to buy 3,000 bushels of May wheat. In an action against the telegraph company for failure promptly to transmit the telegram, he testified that he expected to pay for and actually receive the grain. *Held*, that it could not be said, as a matter of law, that the contract contemplated was void as a gambling contract, within 3 How. Stat. § 9854*f*, prohibiting the purchase and sale of grain, etc., on margins for future or optional delivery, without intention of receiving or paying for the property so bought and sold.

Error to Shiawassee; Smith, J. Submitted October 4, 1898. Decided October 18, 1898.

Assumpsit by John E. Carland against the Western Union Telegraph Company for failure to deliver a message.

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From a judgment for plaintiff, defendant brings error. Affirmed.

John T. McCurdy, for appellant.

Watson & Chapman, for appellee.

HOOKER, J. The plaintiff's action was brought to recover damages from the defendant for its failure to promptly transmit and deliver a telegram, whereby the plaintiff is said to have suffered a loss. The record contains testimony tending to show that the plaintiff, a merchant, residing at Corunna, called the office of the defendant at that place by telephone. Mr. Young, defendant's agent, responded, whereupon the plaintiff asked him to take a message, which he did. The message was as follows, viz.:

"CORUNNA, MICH., Jan. 25, 1898.
"To G. W. WYLIE COMPANY,
"145 Van Buren Street,
"Chicago, Ill.
"Buy three May. JOHN E. CARLAND."

It was intended to be understood to mean, "Buy 3,000 bushels of May wheat."

After waiting 24 hours without response to his message, the plaintiff called the defendant's office by telephone, and was answered by Mr. Reed, Young's assistant, who, in response to his inquiry, assured him that the message was sent. Twenty-four hours later the plaintiff called upon Young, who said he would trace the message, and he reported later that the message was never received at the Chicago office, and a duplicate of the message was sent on January 28th. The testimony tended to prove further that the price of wheat advanced meantime, and plaintiff's agent was obliged to pay a higher price than would have been necessary had the first message been sent promptly. A verdict was rendered in favor of the plaintiff, and the defendant has brought the case to this court by writ of error.

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The action was commenced before a justice of the peace. The docket shows that:

"Plaintiff declared orally on all matters provable under the common counts in *assumpsit*, and especially on a contract with said defendant, and files a written memorandum of said contract, and claims damages $300 or under.

"*Written Memoranda of Plaintiff's Declaration Herein.*

"Plaintiff says that heretofore, to wit, on the 25th day of January, A. D. 1898, said defendant was, and still is, a telegraph company and corporation engaged in the telegraph business, and a common carrier of telegraph messages. And on, to wit, the 25th day of January, 1898, said defendant undertook, for a valuable consideration, to wit, 40 cents, to convey and deliver for said plaintiff a telegraph message to G. W. Wylie & Co., No. 145 Van Buren street, Chicago, Ill., which message was as follows: 'Corunna, Mich., Jan. 25th, 1898. To G. W. Wylie & Co., 145 Van Buren Street, Chicago, Ill.: Buy three May. J. E. Carland,'—which message instructed G. W. Wylie to purchase for said plaintiff 3,000 bushels of wheat, to be delivered to said plaintiff on May first. And said defendant, by its contract with said plaintiff, owed said plaintiff a duty to deliver said telegram promptly, and without unnecessary delay. But, notwithstanding such contract and duty, said defendant wholly failed to deliver said telegram in any manner, and wholly failed and neglected so to do, and, on account of such failure and neglect of said defendant, said plaintiff was deprived of and lost large gain and profits on said wheat which the said George W. Wylie would have purchased for this plaintiff, and said plaintiff was deprived of the opportunity of purchasing said wheat on said 25th day of January, 1898, and on account of which said plaintiff has been damaged in the sum of $300, for the recovery of which this suit is brought.

"J. E. CARLAND."

Several assignments of error relate to the declaration, it being claimed that it does not state a cause of action; that there is a misjoinder of counts; that the *ad damnum* clause, being $300, was fatal to the jurisdiction of the justice; and that, if none of these points are valid, the court should have compelled an election of counts.

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It is manifest from the record that the plaintiff did not recover upon the common counts, and that, there being nothing in the case that tended to support them, they were practically abandoned, and an election would have been an empty form.

The special count appears to have been intended as a count in *assumpsit* for the breach of a contract, and not a count in case for a negligent injury in the nature of a tort. See Tiff. Justice's Guide (How. 5th Ed.), 183. It follows that, being a count in *assumpsit*, it was properly joined with the common counts, as "all causes of actions enforceable in *assumpsit* may be joined." 1 Enc. Pl. & Prac. 169.

But it is contended that there can be no recovery in *assumpsit* in such cases, and that the action must be case for a breach of duty, and not *assumpsit* for breach of contract. Counsel says that the "gist of these actions is negligence," quoting the language of Mr. Justice GRANT in *Birkett* v. *Telegraph Co.*, 103 Mich. 367 (33 L. R. A. 404, 50 Am. St. Rep. 374). We think counsel has misinterpreted this language, and that there is nothing in that case which compels one having contract relations with a telegraph company to forego an action of *assumpsit* upon breach of the contract, and resort to an action *ex delicto*. It was true that negligence was the gist of that action, because the conditions which were made a part of the contract made it essential to recovery. In this case the plaintiff's claim is that the usual conditions are not a part of the contract.

"Where the sender can show that, through the negligence of the company in transmitting or delivering a message, he has suffered a legal injury, there can be no question as to his right to sue for damages; and this whether the right of action be regarded as resting in contract, or in tort for the breach of public duty." 25 Am. & Eng. Enc. Law, 824; Gray, Telegraphs, § 64; *Playford* v. *Telegraph Co.*, L. R. 4 Q. B. 706, 10 Best & S. 759.

Again:

"The action is properly one *ex contractu*, and based on

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the contract of sending." 25 Am. & Eng. Enc. Law, 830.

In the case of *Western Union Telegraph Co.* v. *Carew*, 15 Mich. 525, cited by counsel, the action was *assumpsit*, and, though the case was reversed, the court seems to have recognized the propriety of the form of action by ordering a new trial. There may be cases where an action upon contract would not be appropriate, as where the plaintiff was not a party to the contract. In actions brought by the person to whom the message is addressed, some of the courts so hold. This is so in England, where the rule is strictly enforced; but in this country there is a want of harmony upon the subject. See 25 Am. & Eng. Enc. Law, 824.

This also disposes of the jurisdictional question, as the statute (2 How. Stat. § 6814) confers concurrent jurisdiction upon justices of the peace in all civil actions upon contract where the debt or damages do not exceed $300. The declaration was entitled to the liberal treatment which the courts accord to pleadings in justice's court, and sufficiently set forth the alleged contract, and its breach, to apprise the defendant of the plaintiff's claim. This also disposes of the objection made to the introduction of the depositions.

A number of questions relate to the alleged contract. It is contended that the contract to send the message was subject to the conditions which the defendant usually imposes upon its patrons; that Young was, by the plaintiff, made his agent to write the telegram upon the blank containing the conditions; and that receiving a message upon any other terms than such conditions would be outside of the scope of Young's authority. Young, being the person in charge of the defendant's business, and authorized to receive telegrams, was acting within the general scope of his authority in so doing, and the plaintiff was not bound, at his peril, to ascertain the secret instructions that the defendant had given in relation thereto. In Maryland some recognition has been given to the defendant's conten-

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tion by cases which hold that the sender of a message must be supposed to be informed in regard to the rules and regulations of the telegraph company; but the weight of authority is to the contrary. See Thomp. Elect. §§ 211, 212, for a discussion of this subject; also, 25 Am. & Eng. Enc. Law, 804; *Beasley* v. *Telegraph Co.*, 39 Fed. 181. But, while this is true, if the plaintiff had knowledge of the rules and regulations under which the defendant did business, he would be bound by them so far as they were valid and binding upon others, and it was a question for a jury to determine whether he had such knowledge or not, if a question in the case.

Should it be said that Young, in receiving by telephone and writing such message, was the agent of the plaintiff? We are cited to several cases holding that the operator is such agent, under somewhat similar circumstances. Thus, in the case of *Western Union Telegraph Co.* v. *Edsall*, 63 Tex. 677, where, at the request of the sender of the message, it was written by the operator upon a blank of the company, which the sender signed, it was held that the operator was, as to that message and its preparation, the agent of the sender. The court said: "Evidently the operator, in the preparation of the message, was acting for the appellee, and not the company. True, he was the agent of the company to receive and forward messages, but not to write messages for others." This case was followed in the case of *Western Union Telegraph Co.* v. *Foster*, 64 Tex. 220 (53 Am. Rep. 754). In that case the sender wrote the message, and, upon its being read over by the clerk, he (the sender) detected a mistake in it, and the clerk undertook to correct it by an interlineation, which he made in a wrong place. The court held that he was not acting within the scope of his authority, and was the agent of the sender. In a still later case the Texas court of civil appeals has sustained this doctrine. See *Gulf, etc., R. Co.* v. *Geer*, 5 Tex. Civ. App. 349. The original message, written upon a piece of brown paper, was rejected by the operator as

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unintelligible, and by him handed back to the person sent by the plaintiff to deliver the same. Plaintiff's messenger stated to the operator that he was hot and nervous, and asked the operator to write down the message. He wrote it on a telegraphic blank, as dictated, and sent it. It was held that the operator, in the preparation of the message, was acting for the sender, and not the company, and that the plaintiff could not, therefore, complain of his act in writing the message upon the form commonly used for the purpose, and that the conditions upon the blank were binding upon the sender.

It seems to us that in the cases cited the Texas court went too far if it took judicial notice that the scope of the agent's authority did not permit him to write messages for those desiring to send them, who, from infirmity, were incapacitated from writing the same, or were, from ignorance, unable to do so. The law does not forbid such authority, nor does it make it the duty of the sender to write the message. If the rules of the company forbade it, there is nothing in the case to show that the fact was brought home to the knowledge of the patron, and the rule would have no greater force than any other of which he was ignorant. We cannot conclude, in the absence of proof, that the telegraph companies expect their operators to turn away patrons who cannot write, or that they keep telephones in the office, but do not permit their use in their business by their patrons who send and receive messages. And we are of the opinion that such use should not be altogether at the peril of the patron, or that he should suffer for mistakes made at either end of the line, merely because such are the instructions to the operator, or made the subject of a rule of which the patron has no knowledge. It would seem more reasonable to hold such acts to be within the general scope of his authority, or, at least, hold it to be a question for a jury. There is sufficient justification for the decision in the *Edsall Case* without invoking such a rule, for the sender signed the message upon the blank, thus making it his own, under

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the current weight of authority that so holds, although the conditions be not read. 25 Am. & Eng. Enc. Law, 805, and cases cited in note 1. So, in the case of *Gulf, etc., R. Co.* v. *Geer*, *supra*, the message was written upon the blank by request. The *Foster Case*, *supra*, more nearly sustains defendant's contention. We are cited to no authorities in support of the Texas cases. We are of the opinion, therefore, that the court committed no error in holding that Mr. Young acted as agent for the defendant, under the proofs contained in the record, and might properly have instructed the jury that he was not shown to have acted as agent for the plaintiff.

It is urged that the court erred in permitting the plaintiff to testify to the meaning of the words used in the dispatch, viz., "Buy three May." Counsel cites some authorities supporting the doctrine that such evidence is not admissible where the statute of frauds has application; but no such question is raised here. There was no contract with the Wylie Company; merely a request to purchase something. If the language had a secret meaning, it was proper to show the fact. Ciphers play an important part in business affairs, and we see no reason why they are not as proper subjects for translation as foreign languages.

The defendant asserts further that there was no competent evidence that the telegram was not delivered. Young stated such fact to the plaintiff before sending the duplicate message, and we think this was an act within the scope of his authority, and a part of this transaction. As it is not in any way contradicted, it is unnecessary to inquire whether the testimony of the Chicago witnesses upon the same subject was admissible or not.

We are of the opinion that the court did not err in leaving the question of the price of wheat at Chicago to the jury. The plaintiff testified that he knew what it was, and his cross-examination did not show that he had no knowledge upon the subject.

It is contended further that this telegram was sent in

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furtherance of a gambling contract, which would have been void under the statute, and that damages for a failure to deliver it cannot be recovered. 3 How. Stat. § 9354*f*, prohibits the purchase and sale of grain, etc., on margins for future or optional delivery, without any intention of receiving or paying for the property so bought or sold. If this claim were conclusively proved, so that we could find the fact as alleged, we should have no doubt that the plaintiff's action must fail; but this is a disputed fact. The plaintiff testified that such an arrangement was not contemplated, and that he expected to pay for and receive the grain. We have no occasion to express our opinion of the matter. There was evidence for the jury, and the responsibility of justly determining this fact was theirs. Every contract for a future delivery of grain is not a gambling contract. It is only when the parties mutually understand it to be such, and no actual sale or purchase or contemplated delivery is involved, and where the one is to pay and the other receive the amount of fluctuations in the market, that this statute applies. It is the pretended, and not the actual, buying and selling of grain, etc., that is prohibited. An extended discussion of this subject will be found in 8 Am. & Eng. Enc. Law, 1005 *et seq.* The subject is also fully discussed by Mr. Justice MARSTON in *Gregory* v. *Wendell*, 39 Mich. 338 (33 Am. Rep. 390), and later, upon another review of the same case, by Mr. Justice COOLEY. See 40 Mich. 435.

The judgment is affirmed.

The other Justices concurred.

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HENRY v. GATES.

JUSTICE'S JUDGMENT—LOST RECORD—PAROL PROOF.

Complainant, claiming to have obtained a judgment against defendant before a justice since deceased, was unable to find either the docket or any paper in the case, except one purporting to be an execution and return. He produced this in evidence, and testified that he saw the judgment entered upon the docket, but offered no proof as to the contents of the lost record. *Held*, insufficient to prove the judgment.

Appeal from Branch; Yaple, J. Submitted October 4, 1898. Decided October 18, 1898.

Bill by Warren Henry against Jesse Gates and Delos P. Leonard to reach the interest of William B. Gates, a judgment debtor, impleaded with said defendants, in certain moneys in the hands of defendant Gates as executor of the will of Ellen A. Jones, deceased. From a decree for complainant, defendants appeal. Reversed.

A. L. Locke (*H. H. Barlow*, of counsel), for complainant.

George Styles (*H. J. Barton*, of counsel), for defendants.

HOOKER, J. The complainant obtained a judgment against William B. Gates in justice's court for $208.79 damages and $2.30 costs, in the year 1877. Execution was issued, and returned unsatisfied, as appears from the execution. The justice is dead, and after diligent search it was impossible to find his docket, or any paper in the case except the execution and return. The issue of this execution was delayed upon the promise of Gates to sell his wheat and pay the judgment; but, after selling his wheat, he absconded, and has since lived in the State of

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Washington. In the year 1897, his sister, residing in Branch county, Mich., died, leaving a will, whereby she bequeathed to him her property. Immediately after her funeral, the property, consisting of securities, came into the possession of Leonard, her sister's husband. Jesse Gates, a brother, was named as executor; and, after proceedings were instituted for the probate of the will, the complainant had a conversation with him, requesting payment of his claim, and offered to take half of it, but this was refused. Jesse Gates offered to pay him $50, and afterwards, acting under the advice of counsel, sent an assignment to William B. Gates, who signed and returned it duly signed, whereby he assigned to Leonard all of his interest in the estate, the proceedings to probate the will being meantime postponed. This assignment was dated September 8, 1897. It was delivered to Leonard, and he gave his note for $500, payable on or before a year from its date. What the date was does not appear, as the note does not appear to have a date. Leonard testified that he paid $400 upon the note by a draft sent William B. Gates on October 13th, and the remainder later. The complainant filed a bill soon after the will was probated, to reach the interest of William B. Gates in the hands of the executor, and some months later, on being advised of Leonard's connection with the transaction, filed an amended bill, making him a party. From a decree in favor of the complainant, the defendants have appealed.

Defendants' brief states that there are two questions in the case:

First, whether either of the defendants is liable to the complainant upon the merits.

Second, whether a bill in chancery will lie to establish a lost judgment of a justice of the peace, rendered in this State, there being no copy or note of the judgment.

We are convinced from the testimony in the case that the complainant had a valid claim against William B. Gates at the time that he left Michigan, but the amount of such claim does not appear. He testified that 40 years

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ago he had a note against him, but the note was not produced, nor is there any competent evidence to show its date or amount. The witness testified, further, that this note was sued before one Sawin, a justice, and that judgment was rendered upon it, and that he saw the entry of the judgment upon the docket. A paper purporting to be an execution issued upon such a judgment appears in the record, but such execution is insufficient to show a valid judgment. It is no less hearsay than would be testimony of oral statements of the justice to that effect.

To prove a justice's judgment, it must be shown that jurisdiction of the defendant was obtained, and that at a proper time a trial was had and a judgment rendered, and its amount. This would be required if the docket were produced, and certainly proof that the lost docket contained as much is requisite. *Kenyon* v. *Baker*, 16 Mich. 373 (97 Am. Dec. 158); *Hickey* v. *Hinsdale*, 8 Mich. 267 (77 Am. Dec. 450). It is the rule that the loss of the record must first be shown, and then the substance of the contents must be established. 1 Whart. Ev. § 139. In section 140 it is said: "But, to authorize *memoriter* proof of a lost document or record, the witness must have read it, and be able to speak at least to the substance of its contents." See, also, *Coxe* v. *England*, 65 Pa. St. 212. In *Com.* v. *Roark*, 8 Cush. 210, it was held that "the contents of a complaint and warrant in a criminal case, lost after being returned into court, may be proved by secondary evidence; and witnesses to prove the contents may state the substance, without giving the exact words." See, also, *Simpson* v. *Norton*, 45 Me. 281; *Hall* v. *City of Manchester*, 40 N. H. 410.

It is manifest that anything less than a statement of the contents would be unsafe, and, especially in criminal cases, could not be accepted. It would necessarily involve an opinion of a witness to say that a judgment or warrant—*i. e.*, a valid judgment or warrant—existed, and that would be clearly inadmissible. It has been held that previous talk of the parties as to what they proposed to

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agree to in the writing is not even secondary evidence of the contents of the paper. *Richardson* v. *Robbins*, 124 Mass. 105. And the opinion of the witness as to the effect of the language of a paper, the language not being given, was held inadmissible in *Elwell* v. *Walker*, 52 Iowa, 256. In 1 Greenl. Ev. § 558, it is significantly said: "Satisfactory proof being thus made of the loss of the instrument, the party will be admitted to give secondary evidence *of its contents.*" This court has recognized the rule in *Norvell* v. *McHenry*, 1 Mich. 227, which implies the necessity of proving the *steps taken* before judgment. See, also, *Eslow* v. *Mitchell*, 26 Mich. 500. *In re Lambie's Estate*, 97 Mich. 55, recognizes the rule, though itself exceptional. In *Shouler* v. *Bonander*, 80 Mich. 534, Mr. Justice CAHILL says, upon behalf of the court: "When parties rely upon parol evidence to establish the contents of a written agreement, they should be required * * * to show its contents by proof," etc.; quoting with apparent approval the following: "No vague, uncertain recollection concerning its stipulations ought to supply the place of the written instrument itself. The substance of the agreement ought to be proved satisfactorily;" citing *Tayloe* v. *Riggs*, 1 Pet. 600, and *Richardson* v. *Robbins*, *supra*.

It is with reluctance that we reach the conclusion that proof of judgment is wanting, and that we cannot afford the complainant the relief that we would be glad to give him.

The decree is reversed, and the bill dismissed, with costs of both courts.

The other Justices concurred.

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LITCHFIELD v. TUNNICLIFF.

1. EXECUTOR'S SALE—INDIRECT PURCHASE BY EXECUTOR—RECORDING LAWS—NOTICE.

   Evidence of record that an executrix sold property of the estate under license of the probate court, and, on the day after the sale was confirmed and the deed executed, took a quitclaim deed to herself from the purchaser, is notice, *it seems*, that she was indirectly interested in the sale, contrary to the statute (2 How. Stat. § 6042).

2. SAME—LIMITATION OF ACTIONS—LIFE ESTATES.

   An executrix who unlawfully bids in, at a sale of decedent's property, lands devised to her for life, and who afterwards executes to a third person a deed purporting to convey the fee, cannot rely on the statute of limitations to make the title good as against the heirs, since the heirs could not maintain ejectment in her lifetime.

3. SAME—MORTGAGES—CONSIDERATION.

   A mortgage executed by one who is interested as legatee in having an estate settled, to secure the performance by the executrix of her agreement either to perfect in her grantee, within a given time, the title to lands which had belonged to the estate, subject to a life interest in the executrix, and had been sold under license of the probate court, and purchased indirectly by herself, or, failing in this, to take back such title as the grantee has, paying therefor an agreed amount, is supported by a sufficient consideration.

Appeal from Jackson; Peck, J. Submitted October 4, 1898. Decided October 18, 1898.

Bill by Emeline A. Litchfield against Caroline E. Tunnicliff and Rob Breck Tunnicliff to foreclose a mortgage. From a decree for complainant, defendants appeal. Affirmed.

Russell C. Ostrander, for complainant.

Charles A. Blair and *Thomas E. Barkworth*, for defendants.

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MOORE, J. The husband of Caroline E. Tunnicliff, one of the defendants, died in 1881, leaving a will, which appointed Mrs. Tunnicliff his executrix. The other defendant is an adopted son of Mr. and Mrs. Tunnicliff. By the provisions of the will, the widow was given a life estate in all of the real and personal property. The adopted son was given a legacy of $10,000. Included in the real estate was a home occupied by Mr. and Mrs. Tunnicliff. In 1881 a claim of $2,800 was allowed in favor of Mrs. Tunnicliff against her husband's estate. A license was granted the executrix to sell the homestead to pay the debts, and it was sold by her, in December, 1881, upon the bid of Andrew J. Gould, for $2,500. The sale was confirmed by the judge of probate, and a deed was executed to Mr. Gould, who upon the next day executed and delivered to Mrs. Tunnicliff a quitclaim deed of the premises. Mr. Gould purchased the property for Mrs. Tunnicliff. Payment for it was made by Mrs. Tunnicliff crediting the estate $2,500 received for the property, and charging it with a like amount paid upon her claim against the estate. She remained in possession of the property until October, 1883, when she conveyed the property, by a deed with the usual covenants of warranty, to the complainant and her husband, who went into possession. Later, Mr. Litchfield deeded his interest in the premises to his wife, the complainant.

In 1893 a dispute arose over the line between the property and the adjacent property, when the title conveyed to Mr. and Mrs. Litchfield was questioned, upon the ground that it was unlawful for the executrix to purchase the real estate, directly or indirectly, sold by her at executrix's sale. Both parties to the deed conceded there was some question about the title, and efforts were made for the purpose of perfecting it. Mrs. Litchfield claimed she was entitled to a title about which there could be no question, and this claim was conceded by Mrs. Tunnicliff and her adopted son. It was finally agreed between the parties that Mrs. Tunnicliff should perfect the title within one

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year, or, in default thereof, that she would repurchase the property from the complainant for $4,000. To secure the performance of this agreement, Rob Breck Tunnicliff, who was interested, as a legatee under the will, in having the estate settled, made a mortgage to the complainant. This mortgage was drawn by an able lawyer, and the parties all understood the purpose for which it was made. There were a number of nonresident heirs to the property, and an effort was made to obtain deeds from them. The effort was not successful. At the end of the year, Mrs. Tunnicliff refused to repurchase the property. The complainant instituted this proceeding to foreclose the mortgage. A decree was entered in her favor. From this decree, defendants appeal, claiming—

First. That the mortgage was given without consideration.

Second. That the sale made by the executrix was not void.

Third. That the statute of limitations has made the transaction good.

As to the last claim it may be said ejectment could not be brought by the heirs of Mr. Tunnicliff against Mrs. Tunnicliff or her grantee during her lifetime, for the reason that by the terms of the will she was given a life estate in the property.

2 How. Stat. § 6042, reads as follows:

"The executor or administrator making the sale, and the guardian of any minor heir of the deceased, shall not, directly or indirectly, purchase or be interested in the purchase of any part of the real estate so sold, and all sales made contrary to the provisions of this section shall be void."

This statute has been before this court several times, and the cases are cited in the note to this section. The authorities are not altogether uniform in deciding whether such sales are void or only voidable. See Freem. Void Jud. Sales, § 33; *McGraw* v. *Daly*, 82 Mich. 500; *Otis* v.

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Kennedy, 107 Mich. 312. We do not deem it necessary to decide whether the title obtained by Mrs. Litchfield was void or simply voidable. The record in the office of the register of deeds showed, long before Mrs. Tunnicliff conveyed the property, that she got her title by means of a quitclaim deed from Gould, dated but a day later than his deed and the order confirming the sale to him. It might well be argued that this was notice to all subsequent purchasers that there was a question about the validity of the sale.

When the complainant obtained her title, she was assured by Mrs. Tunnicliff it was good. She paid for a good title. At the time the mortgage was drawn, it was conceded there was a question about the title; and it was agreed that, if Mrs. Litchfield would give Mrs. Tunnicliff a year in which to perfect the title, she would do so, or take back such title as Mrs. Litchfield had, paying her $4,000 for it. This was consented to by Mrs. Litchfield, and the mortgage was drawn. The consideration was sufficient. The default in the mortgage had occurred. The decree was properly entered, and it is affirmed, with costs to complainant.

The other Justices concurred.

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GARNER v. WALLACE.

1. TAX SALES—PROOF OF PUBLICATION—SUFFICIENCY.
   An affidavit attached to a copy of the petition of the auditor general for the sale of lands delinquent for taxes, and of the order of hearing thereon, stating that "the annexed printed notice was printed * * * for ——— successive weeks, at least once in each week, which publication commenced on the 23d day of September, 1893, and terminated on the 21st day of October, 1893," sufficiently shows a publication of said petition and order once in each week for four successive weeks, as required by section 66 of the tax law of 1893.

2. SAME—STATE LANDS—TRANSMISSION OF LISTS TO TREASURER.
   The provision of section 78 of the tax law, requiring the auditor general to furnish to the county treasurer, in October of each year, a statement of all lands theretofore bid off to the State, then remaining unredeemed, was not designed for the benefit of the landowner, and hence a delay in forwarding such statement will not invalidate a subsequent sale by the State.

3. SAME—NOTICE OF SALE.
   And, for the same reason, the notice of sale of such lands, provided for by section 79, need not contain a description of the lands.

4. SAME—DEED AS EVIDENCE.
   An objection that a tax deed fails to recite the statutory authority for its issuance, and is therefore inadmissible to prove title in the grantee, is without force, where the fact that it was executed in pursuance of the statute appears from the files and records in the tax proceedings, which are introduced in evidence.

Error to Huron; Beach, J. Submitted October 4, 1898. Decided October 18, 1898.

Ejectment by William A. Garner and George F. Brown against James O. Wallace, Roxiana Wallace, and Frank W. Hubbard. From a judgment for defendants on verdict directed by the court, plaintiffs bring error. Reversed.

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Black & Brown, for appellants.

W. T. Bope (*Bacon & Palmer*, of counsel), for appellees.

LONG, J. This action of ejectment is brought by plaintiffs to recover possession of 160 acres of land in Huron county. They claim title under a tax deed for the taxes of 1891. The defendants Wallace are the owners of the original title, and reside upon the land, and defendant Hubbard has an interest in it as mortgagee. The court below directed verdict in favor of defendants, and plaintiffs bring error.

The court, in directing the verdict, based his charge upon the insufficiency of the proof of publication of the petition of the auditor general, and the order thereon for the sale of the lands for taxes. The affidavit recites:

"STATE OF MICHIGAN, } ss.
County of Huron. }

"B. F. Browne, of Sand Beach, Michigan, being duly sworn, deposes and says that he is one of the proprietors and publishers of the Huron Times, a newspaper printed and circulated in said county of Huron, and that the annexed printed notice was printed in said newspaper for —— successive weeks, at least once in each week, which publication commenced the 23d day of September, 1893, and terminated on the 21st day of October, 1893."

The proper jurat was added.

Section 66, Act No. 206, Pub. Acts 1893, provides that—

"The auditor general shall cause a copy of said order and a copy of said petition to be published at least once in each week for four successive weeks next prior to the time fixed for the hearing thereof."

The proper petition and order were annexed to this affidavit, the petition being duly signed by the auditor general, and the order signed by the circuit judge of that circuit, stating that the petition would be brought on for hearing on October 23, 1893, at the opening of court on that day, and that the lands described in the petition

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would be sold at the office of the county treasurer on the first Monday of December thereafter. No further proof of publication other than by this affidavit was made on the trial, and counsel for defendants contend that this affidavit does not show a publication for any number of successive weeks, but only that the first publication was on September 23, 1893, and the last one October 21st thereafter; that nothing appears in the affidavit from which it can be inferred that there were any publications between said dates, and therefore it does not show that the petition and order were published at least once in each week for four successive weeks, as required by the statute.

We cannot agree with this contention. The affidavit shows that the annexed printed notice (that is, the petition and order) was printed and published at least once in each week, which publication commenced on September 23, 1893, and terminated on October 21, 1893. Certainly, language could not be employed which would more strongly show that there was a publication at least once in each week between said dates, and hence there was a full compliance with the statute. Once in each week between these dates could not be otherwise than successive weeks. This needs no citation of authority.

Section 78 of the tax law of 1893 provides that—

"The auditor general shall furnish to each county treasurer in the month of October prior to the month of December in the year in which such tax sales are held, as provided in this act, a statement of all lands in his county that may have been bid in for the State, then remaining unredeemed or not otherwise discharged," etc.

It appeared by the testimony of the chief clerk of the auditor general's office that this list was not sent to the county treasurer of Huron county for the year 1894 until November 7th, for the year 1895 until November 2d, and for 1896 until November 20th, and that the land in controversy was included in these lists each year. It is contended that for this reason the sale was void, as the landowner had the right to have these lists sent to the county

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treasurer, so that he might know that his lands were contained therein; and that this statute was enacted for his benefit.

We think this contention has no force whatever. The lands after sale are redeemable at the county treasurer's office, as well as at the office of the auditor general. Defendants had one year from the date of the sale to redeem. They could have found the *status* of the lands in the county treasurer's office as well before these lists were transmitted to that office as afterwards. They were deprived of no rights by the delay in the transmission of the lists, and the information was as open to them before as afterwards. Their land had been sold and bid in by the State at the sales of 1893. The original lists remained in the office of the county treasurer, and showed that the land was sold and bid in by the State. By inquiry there, they would have found that they could redeem there, as well as at the office of the auditor general. This statute was not intended to give the landowner any greater rights, but was passed for the purpose of enabling the county treasurer to know what lands remained unredeemed at the auditor general's office. The statute is not mandatory, but merely directory, and for the convenience of the county treasurer.

Section 79 of the tax law of 1893 provides that—

"The auditor general shall cause to be published for four weeks successively, which shall be construed to mean four publications once a week, next previous to the first Monday of December in the years provided by this act, a notice that the lands described in such statement will be offered for sale at public auction at the time and place designated for the regular tax sales," etc.

These notices were published for the years 1894, 1895, and 1896, and each contained a statement that "said statements contain a full description of each parcel of said lands, and may be seen on application at the office of the county treasurer after they are received by him." It appears that none of these notices contained or had attached to it any descriptions of land. It is contended that they

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should have contained such descriptions of land as were to be sold; that it was the evident intent of the legislature to give the landowner a second notice before the redemption expired.

This statute refers to lands which had been bid in by the State in former years, and were still held by the State; and its intent was to enable the State, by another offering, to dispose of the lands for the taxes, interest, and expenses it had incurred in bidding them in. It was not for the purpose of giving the owner of the land further notice before the period of redemption expired. If these notices had not been published, the landowner whose lands had been bid in by the State the 1st of December previous could not contend that the time for redemption had been extended by such failure to publish the notices. Such owner had a year after sale to redeem, and no more, whether the notices were published or not. It will clearly be seen that it was not for the benefit of the landowner that such statements should be published, and the statute does not require the lists of such lands to be inserted in or attached to the notice. The lists are published the year previous, and, the owners failing to pay, the State takes the bids, in the absence of other bidders. It would be a useless expense to republish the list the succeeding year. The lists are filed with the county treasurer, and any party who desires can redeem his lands, or purchase the bid of the State.

It is also contended that, the deed not reciting that it was made in execution of the statutory power, it could not properly be received as evidence of the plaintiffs' title. The statute does not give the form of the deed to be executed on tax sales. This deed was executed by Stanley W. Turner, as auditor general of the State, and recites:

"That whereas, in pursuance of the provisions of law, the said parties of the second part, on the 28th day of December, A. D. 1896, became the purchasers of the rights of the State in and to the following described lands, situated in the county of Huron, in said State, which were bid off

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to the State for the taxes assessed thereon in the year 1891," etc.

The defendants put in evidence all the proceedings for the sale of the land, including the petition of the auditor general, the order made by the court for the publication thereof, the publication of the petition and order, as well as the decree of the court for the sale of the land. Even if the recitations in the deed were not sufficient to permit the deed to be received as evidence of title,—a point which we need not pass upon,—yet the proceedings and the decree ordering sale show that the deed was made in pursuance of the statute, and together were sufficient to show title in the plaintiffs.

The court should have directed verdict in favor of plaintiffs. The judgment below must be reversed, and a new trial granted.

The other Justices concurred.

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BAAR *v.* KIRBY.

1. MUNICIPAL CORPORATIONS—RESOLUTIONS OF COUNCIL—LODGING VETO WITH CLERK.

Under Act No. 215, Pub. Acts 1895, chap. 9, § 8, giving the mayor of a city of the fourth class three days after the passage of an ordinance or resolution by the council within which he may lodge his veto in the office of the clerk, the placing of a veto in the hands of the clerk at his residence in the evening, within the prescribed time, after making an ineffectual attempt to gain admittance to his office in the afternoon, is sufficient to give the veto effect.

2. SAME—VETO POWER.

Under the further provision of the same section that "no ordinance or resolution" shall have any effect in such case unless passed over the veto, a resolution transferring moneys from the contingent to a special fund may be vetoed.

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Certiorari to Ottawa; Padgham, J. Submitted October 4, 1898. Decided October 18, 1898.

Mandamus by Jacob Baar, mayor of the city of Grand Haven, to compel Thomas E. Kirby, city clerk, to file a veto message. From an order denying the writ, relator brings *certiorari*. Reversed.

Charles O. Smedley, for relator.

Charles E. Soule, for respondent.

LONG, J. Relator is the mayor of the city of Grand Haven. Respondent is the clerk of that city. It appears that at a regular meeting of the common council of that city held on June 2, 1898, a resolution was adopted by a majority vote of that body to transfer the sum of over $7,000 of the contingent funds in the city treasurer's hands, and divide and apportion said moneys to several different funds. The relator, as mayor, on June 3d filed a notice with the clerk that it was his intention to veto the resolution. On Saturday, June 4th, he prepared his veto, went to the office of the city clerk about 25 minutes after 4 o'clock in the afternoon, and found the office locked and the clerk absent. He found the clerk at his residence about 7 o'clock in the evening of that day, and left the veto message with him for filing on that day; and relator claims that he was given to understand the clerk would so file it. The clerk in fact did not place the filing thereon until the following Monday, which was June 6th. The relator presented a petition to the circuit court for Ottawa county for a *mandamus* to compel the clerk to file said veto message as of June 4th. In that petition he sets out the facts above set forth, and alleges that —

"Afterwards, at a meeting of said city council held on June 9, 1898, the said veto was ignored and considered by said city council as null and void, because it was not filed within the statutory period (which statutory period was three days, and expired June 5th); and the said council gives it out and says that the said veto is null and void

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and of no effect, and that said Alderman Kiel's report and resolution are valid, and that said council will consider the same valid, and shall consider said veto invalid."

On return to an order to show cause, counsel for respondent, without filing an answer, moved that the petition be quashed, on the grounds:

(1) That it did not show upon its face that the veto had been lodged in the office of the city clerk within the period prescribed by the charter.

(2) That it did not show any resolution subject to the mayor's veto.

This motion was granted by the court below. The case comes to this court by writ of *certiorari*.

The report of the committee which the resolution adopted recommended the transference from the contingent fund of $7,084.88, and placed it in several funds, such as electric light fund, fire department fund, general street fund, water fund, police fund, poor fund, bonded debt fund, etc. It was the resolution adopting this report that the mayor attempted to veto, in which veto he claimed that it was illegal to divide the contingent fund, and distribute it to these several funds. Whether it was legal or not we do not attempt to decide. The city of Grand Haven is of the fourth class, under Act No. 215, Pub. Acts 1895. By the act, the mayor is made the president of the council, but he has no vote therein except in case of a tie, when he has the casting vote. Section 3, chap. 9, of the act, provides:

"No ordinance or resolution passed by the council shall have any force or effect if, on the day of its passage, or on the next day thereafter, the mayor, or other officer or person legally discharging the duties of mayor, shall lodge in the office of the clerk a notice in writing suspending the immediate operation of such ordinance or resolution. If the mayor, or other officer or person legally exercising the office of mayor, shall, within three days after the passage of any such ordinance or resolution, lodge in the office of the city clerk his reasons in writing why the same should not go into effect, the same shall not go into

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effect, nor have any legal operation, unless it shall, at a subsequent meeting of the council, be passed by a two-thirds vote of all the aldermen elect, exclusive of the mayor, or other officer or person legally exercising the duties of the office of mayor, and, if so repassed, shall go into effect according to the terms thereof. If such reasons shall not be lodged with the clerk as above provided, such ordinance or resolution shall have the same operation and effect as if no notice suspending the same had been lodged with the city clerk; and no ordinance or resolution of the council shall go into operation until after the expiration of twenty-four hours after its passage, unless the said mayor, or acting mayor, shall approve the same in writing."

1. We think the veto message was lodged in the office of the city clerk within the time prescribed by the statute, within its meaning. The mayor gave the notice required by the act, which suspended the immediate operation of the resolution, and this was followed up by the veto message within the time required. It is true that he did not find the clerk in his office in the afternoon; but at 7 o'clock that evening he placed it in his hands, and it became the duty of the clerk to at once place the filing thereon. The statute cannot have the restricted meaning sought to be placed upon it. The lodging of the message in the office of the city clerk was accomplished when it was placed in the hands of the city clerk for filing in his office within the time prescribed.

2. The claim that it was not a resolution which, under the statute, the mayor had the power to veto, has no force. The statute provides that no ordinance or resolution passed by the council shall have any force or effect if the notice is given, and such ordinance or resolution shall not go into effect when the veto message is interposed within the time prescribed, unless the same is passed over the veto by a two-thirds vote of all the aldermen elect.

The order made by the court below will be vacated, and the writ of *mandamus* issued as prayed, with costs of this motion.

The other Justices concurred.

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STEPHENSON *v.* BOARDS OF ELECTION COMMISSIONERS.

1. POLITICAL CONVENTIONS—QUALIFICATIONS OF DELEGATES.
   The decision of a political convention as to the qualifications of its own members is conclusive upon the courts.

2. SAME—TEMPORARY ORGANIZATION—PRESIDING OFFICER.
   The custom that prevails in political conventions, of permitting the chairman of the party committee to preside until a temporary organization is effected, may be disregarded in a particular convention, although there are contesting delegations, between which, in respect to the right to vote upon matters of organization, the chairman is directed by the committee to decide.

3. SAME—NOMINEES OF RIVAL FACTIONS—JUDICIAL INQUIRY.
   Courts will not, at least in the absence of a statute imposing the duty, attempt to determine as to which of the nominees of rival factions in a political convention regularly called, neither of which factions appears to have had a majority of the delegates admittedly entitled to seats in the convention, is the regular nominee of the party.

4. SAME—OFFICIAL BALLOTS—PARTY TICKETS—DUTY OF ELECTION COMMISSIONERS.
   In such case the names of both nominees, if regularly certified, should be given places upon the ballot, the one with the general ticket of the party, the other in the next column, under the party name and vignette; the board of election commissioners deciding which shall go upon the general ticket.

Mandamus by Samuel M. Stephenson to compel the boards of election commissioners for the counties of the Twelfth congressional district to place relator's name on the official ballot as the regular congressional nominee of the Republican party in that district. Submitted October 18, 1898. Writ denied October 25, 1898.

Brown & Trudell (*H. Olin Young*, *Byron S. Waite*, and *Fred A. Baker*, of counsel), for relator.

George Hayden and *Gad Smith* (*H. H. Hatch*; *Harrison Geer*, *A. C. Cook*, and *J. H. Cole*, of counsel), for respondents.

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HOOKER, J. The relator asks a *mandamus* to compel the several boards of election commissioners of the Twelfth congressional district to place the name of the relator upon the Republican tickets throughout the district as candidate for Congress, to the exclusion of the name of Carlos D. Shelden, each claiming to be the nominee of the regularly called convention of the Republican party. The record shows that a congressional convention was called, and the delegates assembled. It is admitted to have been a regularly called convention, and therefore its nominee, if ascertainable, is lawfully entitled to have his name printed upon the ticket.

At the appointed time a large number of persons assembled. Previous to its meeting, George A. Newett, the chairman of the congressional committee, assembled his committee, which, by a vote of three for and two against the proposition, decided that the committee should ascertain in advance what persons were lawful delegates from those counties where there were contesting delegations, and that such persons, and such only, should be permitted to participate in the preliminary work of organizing the convention. For the purposes of this opinion it is sufficient to say that two counties—Dickinson and Marquette—had contesting delegations, and it appears to be admitted that, leaving these counties out, there were 35 delegates who favored the nomination of Mr. Shelden, and 31 who supported the relator. Here, then, was one assembly, in which 87 delegates were entitled to seats, and there were 66 present who are conceded to have been entitled to seats. The chairman of the committee called the convention to order, and, while reading or about to read the call for the convention, a delegate whose right to a seat was unquestioned arose and said, "I nominate Chase Osborn for chairman," and himself put the question, and declared it carried; whereupon Osborn, also a delegate whose right to a seat is undisputed, appeared upon the platform, and attempted to preside over the convention; and, as appears by the proceedings of the convention set up in the return

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of the respondents and affidavits accompanying the same, the business was proceeded with, credentials examined and passed upon, and Carlos D. Shelden nominated, when the convention, or that portion which had not declined to take part in these proceedings, adjourned *sine die*, and its members left the hall. Meantime Mr. Newett, who occupied the same stage, had been elected chairman by a faction of the assembly, a secretary chosen, and committee on credentials appointed, who, after the lapse of a couple of hours, and therefore after the adjournment of the other faction, made a report seating delegations favorable to the relator, and, this being adopted, this faction nominated the relator, and adjourned *sine die*. The officers of each faction filed certificates of nomination with the several boards of election commissioners, and, while we do not find it explicitly so stated, it is perhaps inferable that in some cases these boards refuse to place relator's name upon the ballot, and that others are disposed to do so, to the exclusion of Mr. Shelden.

The relator contends that it was the right and duty of the chairman, acting under the direction of a majority of the committee, to preside over the assembly until the convention should be organized, and to determine who were entitled to vote in effecting such organization, and that the organization of a meeting through the election of Mr. Osborn as chairman was irregular and void, and that the organization perfected by the other faction was the only valid organization, and therefore the only "regularly called convention" whose nominee the law permits to have a place upon the ballot. Political conventions are deliberative bodies, supposed to be made up of representatives of a political party, who assemble at the appointed time and place for the purpose of holding the convention. The delegates usually come armed with something in the nature of credentials which tend to show that they are there by authority; and it has usually been supposed that the assembly itself passes upon the authenticity and sufficiency of such credentials, and it has been quite common

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for conventions to admit bystanders from an unrepresented district to seats as representatives of their locality, although without other authority. While it has doubtless been the common practice for chairmen of political committees to use the gavel to procure order and silence, to read the call, and then to ask the assembly its further will or pleasure, and put motions until a temporary chairman is chosen, we have not understood it to be the province of the chairman to do more, or so much even, if against the will of the assembly. Certainly, we know of no rule of law authorizing it. The assembly is a law unto itself, and has uniformly been the judge of the qualification of its own members, and its decision final.

The contention of the relator seems to be based upon the assumption that the assembly cannot be trusted to faithfully discharge the duty of sifting out the disqualified, and that for that reason there must be some outside authority which shall have power to determine what individual members of the assembly are *prima facie* authorized delegates, and what are not, to the end that the convention shall be legally organized; and the claim that party custom has conferred that power upon the committee. It is said that outsiders may capture the convention under any other rule, or that enough contesting delegates may be sent to control the assembly, thus frustrating the will and thwarting the intentions of the constituency. To this the opposition retorts that the relator's theory is a still better scheme for perpetrating fraud and thwarting the popular will, placing it within the power of a majority of a committee to recognize the partisans of a particular candidate to an extent sufficient to control the organization and the seating of delegates, thereby making his nomination sure and the convention a farce. These difficulties do not now present themselves for the first time. From our earliest recollection party politics has always been a matter of shrewdness and management, not always defensible; yet the people have been left to deal with the difficulties as they arise. It is not to be supposed that com-

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mittees on credentials, however fairly selected, have always dealt justly; and, no doubt, expediency or political exigency has governed their action, to the exclusion of abstract justice. The remedy has usually been either a bolt on the part of the dissatisfied, and the selection of an opposition candidate within the party, or a refusal by the electors to support the nominee; and the courts have been careful not to interfere with the application of these remedies, which have usually been found adequate.

Nothing is more certain than that, when this assembly met, it constituted what the law calls "a regularly called convention;" and, had there been no split, the right of its nominee to a place upon the ticket could not have been successfully questioned upon the ground that it was organized upon the motion of Hambitzer, instead of under the leadership of Newett. But it did split; and we must do one of two things, viz.: Either follow the precedents, and say that we will not decide between the rival factions, or ourselves decide who were the lawfully elected delegates to the convention. To do this, we might be called upon to investigate every ward or township caucus and county convention held in the two disputed counties, and, had either side asked it, throughout the district. We have intimated that the assembly is the judge of the qualification of its members, and that back of its decision we cannot go. Its presiding officer is its creature, and it must protect itself. In turn, its voters must protect themselves against fraud upon their convention or misconduct of its delegates, officers, and candidates; and when a considerable faction of a convention leaves the meeting, and nominates a ticket, claiming to be the representative of the party which called the convention, it is not the province of the courts to determine upon technical grounds that it is not, and that its action is void, and deny it a place upon the ballot, thereby defeating the purification of methods within the party, or to say which faction was right and which wrong. It is a right of the voter to repudiate wrong and corruption and fraud, if it exists, and to pre-

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vent, or unearth and defeat, corruption, and he should not be hampered by technical rules. If in this case this convention was unable to conclude its business in harmony, and the delegates divided and made two nominations, they should not be denied the privilege of going to the polls with both. Each nominee is here contending that he represents the only pure republicanism of the district, and is the lawful nominee of the true party. The electors must decide between them. In such case we know of no way of determining which of these names ought of right to go upon the Republican ticket. If it were left to the voters, there would doubtless be an honest difference of opinion upon the merits of the question. The same may be true of the boards. They may not know what they should do, and we cannot tell them further than to say that, under the admitted facts and the precedents, both are entitled to places upon the ballot.

It has been held in this State that, where rival factions of a regularly called convention of a party nominate and certify different tickets, the election commissioners have no authority to accept one, to the exclusion of the other; and it was held, further, that, under such circumstances, both tickets should be printed upon the ballots; and it was said in that connection that the name of the party as certified should be placed above the ticket, without further addition or distinctive designation than such as was contained in the certificates furnished. See *Shields* v. *Jacob*, 88 Mich. 164 (13 L. R. A. 760). That case arose under Act No. 190, Pub. Acts 1891, which provided for what is ordinarily called an "Australian Ballot," requiring the adoption of a vignette by each party, under which the party ticket was required to be printed.

A similar question arose in Colorado the next year, under a law of like character, which provided that the officer with whom the certificate was filed should pass upon objections seasonably filed. At a convention regularly called, a disagreement arose, which resulted in a division and two tickets; each faction claiming to repre-

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sent the party, and each filing the certificate provided for by the statute. It was claimed that the secretary of state had authority to determine which ticket was entitled to a place upon the ballot; but the court held otherwise. It was said that his power extended only to the correction of informalities. The court said:

"As to what were the duties of the secretary of state under the circumstances of this case is still, however, to be decided. Here we have to deal with two conventions, each claiming the right to represent the same political party. The act itself will be searched in vain for any provision for such a contingency. It was not contemplated by the legislature, and therefore not provided for. It should not be a matter of surprise that the act as originally passed is not perfect in all particulars. The beneficent laws of the world have grown with time, as the result of experiment and amendment. There being no provision in the act for a condition such as we have presented in this case, some have reached the conclusion, upon reading section 3 of the act [Sess. Laws 1891, p. 143], that the secretary of state could only certify one ticket as the ticket of the Democratic party, and that, therefore, of necessity, the duty devolved upon him of determining which of these conventions was entitled to speak for the Democratic party of the State of Colorado. Certainly a court would be doing violence to the intelligence of any legislative body to assume that it was intended that such a question could be determined within 48 hours from the time objections were filed. The validity of the organization and acts of each convention is embraced in the controversy, the determination thereof involving party usages, party practices, and party principles, necessitating, perhaps, the taking of evidence of witnesses living at widely separated points. The section of the act under which it has been claimed the duty devolves upon the secretary of state to determine which convention is entitled to represent the Democratic party applies to county, city, and town clerks equally as well as to the state officer. It is as follows:

"'SEC. 3. Any convention of delegates of a political party which presented candidates at the last preceding election, held for the purpose of making nominations to public offices, and also voters to the number hereinafter specified, may nominate candidates for public

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offices to be filled by election within this State. A convention, within the meaning of this act, is an organized assemblage of voters or delegates representing a political party which, at the last election before the holding of such convention, polled at least ten per centum of the entire vote cast in the State, county, or other political division or district for which the nomination may be made. A committee appointed by any such convention may also make nominations to public office when authorized to do so by resolution duly passed by the convention at which such committee was appointed.'

"The argument upon this section is that, to entitle the convention of any party to nominate candidates for public offices, such party must have polled at least ten per centum of the entire vote cast in the State at the last preceding election, and that only one set of nominations can be filed by a single political party. That the argument has force will be admitted. It is quite probable the legislature had in contemplation the nomination of one ticket only by a political party, as the statute makes no provision for the condition with which we are confronted. In this case we have two certificates of nomination, each in apparent conformity with the law. As we have shown, the secretary of state is not empowered to decide as between these certificates. Therefore it is his duty to certify both tickets to the county clerks, in order that both may be printed upon the official ballots. By pursuing this course, the merits of the opposing candidates will be submitted to the people, the tribunal under our system of government that must ultimately pass upon such questions. The conclusion that the secretary of state should, under the circumstances, certify both sets of nominations to the county clerks, to be printed upon the official ballots, is in harmony with the rule of construction which requires the courts, in cases of doubt between two constructions, to follow that which will afford the citizen the greater liberty in casting his ballot. This is in accordance with the previous decisions of this court. In the case of *Kellogg* v. *Hickman*, 12 Colo. 256, Mr. Commissioner Stallcup, in an able opinion, which was adopted by this court after careful consideration, held that this should be the policy of the courts. See, also, *Allen* v. *Glynn*, 17 Colo. 338 [15 L. R. A. 743, 31 Am. St. Rep. 304]. The severe penalties provided by the act for the filing of a false certificate of nomination will, we think, furnish a sufficient safeguard against fictitious certificates; if not, the power is in the legislature to provide adequate protection.

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"Little weight should be attached to the argument that the voters may be deceived by having two Democratic tickets in the field. At one time, no doubt, voters were often misled by having names printed under certain designated headings that did not properly belong thereunder. But this deception was only accomplished by secrecy, and by the lateness of the hour at which such irregular tickets were distributed, usually only upon the day of election. But, under the present law, the danger of deception in the manner indicated is certainly reduced to the minimum. The secretary of state is required to certify these tickets to the county clerks, and the county clerks must, in turn, cause the same to be published several days before the election. Thus the fullest opportunity to expose fraud and prevent deception is provided for. In the present instance, different emblems were selected by the two conventions, and this furnishes an additional safeguard against deception." *People* v. *District Court*, 18 Colo. 26.

Phelps v. *Piper*, 48 Neb. 724 (33 L. R. A. 53), was a case where different conventions, called by different committees, but both claiming to represent one and the same party, held conventions at different times and places; and the question of the right of one ticket to a place on the ballot came before the court of last resort. It was held that both tickets were entitled to places upon the ballot. The court said:

"The relator, by this proceeding, seeks to prevent the certification of the candidates of the Lincoln convention as Democratic candidates. If the action of the secretary of state can be controlled by the court in this manner, it must be because it is his duty in such case to determine, as between two bodies or factions, each claiming to represent a political party entitled to have its candidates' names placed upon the ballots, which of such bodies or factions, according to the rules and customs of such party, rightfully represents it; and, further, that, when the secretary fails to so adjudicate such question, the court shall determine it, and issue its mandate to the secretary of state accordingly. To our minds neither proposition is tenable. Indeed, we think that the case of *State* v. *Allen*, 43 Neb. 651, is conclusive on the first question, at least. It was there held that it is not the province of the secretary of

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state to determine which of two rival state conventions of the same party is entitled to recognition as the regular convention; and, further, that where two factions of a political party nominate candidates, and certify such nominations to the secretary of state in due form of law, the latter will not inquire into the regularity of the convention held by either faction, but will certify to the several county clerks the names of the candidates nominated by each, such practice being in harmony with the rule which requires courts, in case of doubt, to adopt that construction which affords the citizen the greater liberty in casting his ballot. In the case cited, candidates representing the same faction as that represented by the candidates which we will here, for brevity, designate the 'Mahoney Ticket,' applied for a *mandamus* to compel the secretary of state to certify their names as the candidates of the Democratic party, the secretary having refused to do so. The court denied the writ, holding as we have already stated, and, further, that, the record not disclosing that the relators had been nominated by any convention whatever, the secretary of state could not be required to certify the nominations, because it is his duty to determine, in the case of a certificate filed with him, whether such candidates were in fact nominated by a convention or assemblage of voters or delegates claiming to represent the party; that is, he should satisfy himself of the genuineness of the certificate. But he has no authority, where a convention in good faith, claiming to represent the party, has in fact certified its nominations to him in due form, to refuse to recertify the same to the county clerks. We entertain no doubt of the correctness of the principles announced in that case; and it follows that the court, by a writ of *mandamus*, cannot compel the secretary of state to perform an act which he has no legal authority to perform. If it was the duty of the secretary to certify both sets of nominations, and if he had no power to determine, between the rival factions, which faction represented the Democratic party, then it seems perfectly clear that the court can neither require him to make such decision, nor can the court itself determine which faction rightfully represents the party, and upon such determination require the secretary to omit from his certificate one set of candidates, which *State* v. *Allen* declares it is his duty to include in the certificate.

"The legislature has not provided any means for determining such controversies. Political parties are voluntary

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associations for political purposes. They establish their own rules. They are governed by their own usages. Voters may form them, reorganize them, and dissolve them at their will. The voters ultimately must determine every such question. The voters constituting a party are, indeed, the only body who can finally determine between contending factions or contending organizations. The question is one essentially political, and not judicial, in its character. It would be alike dangerous to the freedom of elections, the liberty of voters, and to the dignity and respect which should be entertained for judicial tribunals, for the courts to undertake in any case to investigate either the government, usages, or doctrines of political parties, and to exclude from the official ballots the names of candidates placed in nomination by an organization which a portion, or perhaps a large majority, of the voters professing allegiance to the particular party believe to be the representatives of its political doctrines and its party government. We doubt even whether the legislature has power to confer upon the courts any such authority. It is certain, however, that the legislature has not undertaken to confer it."

The case of *State* v. *Johnson*, 18 Mont. 556, arose under a similar statute, and bears a striking resemblance to the present case. The convention was regularly called, but trouble arose when the secretary of the committee attempted to call the convention to order. In the confusion that ensued, some of the delegates withdrew, and assembled at another place, claiming to act under the regular call. Each faction nominated a full ticket. The question of the respective rights as to places upon the ballot reached the supreme court of Montana, which disposed of the question as follows:

"The question is simply one of the relative rights of rival factions within the ranks of the regularly elected delegates. Such a contention, under all the facts of the case, it is well to leave to the electors to determine. They cannot well be misled, because the names of the two factions should appear under different heads on the ballot, and each faction will appear but once. At all events, we shall follow the rule laid down in *Phelps* v. *Piper*, 48 Neb. 724 [33 L. R. A. 53], and decline to interfere."

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It is observable that all the cases cited deny the authority of the officer or court to determine that the candidate of one or the other of two factions of a party is regularly nominated, and entitled to a place upon the ballot, where the statute has not expressly or by necessary implication conferred the power. Several of these question the expediency of committing such power to either, and some doubt the power of the legislature to pass such a law. There are several decisions in the State of New York which hold that the courts have authority to pass upon such questions, and determine, between factions of a party, the right to a place upon the ticket. These decisions are not adjudications by the court of last resort, however, and they arise under a statute expressly conferring the power. In the year 1897 a case was decided by the court of appeals (*In re Fairchild*, 151 N. Y. 359), where it was held that the action of the party authorities—*i. e.*, conventions and committees—should be recognized as of controlling importance. We do not understand from what we are able to gather from the case that it was held that such decision was final or binding upon the court, but that it was proper to follow the determination of the party authorities; but, be that as it may, the important fact that the statute of New York expressly gives the courts jurisdiction in such cases does appear. So, it is not at variance with the other cases cited, except as some of them doubt the wisdom and others the constitutionality of laws permitting courts to decide one of two rival factions regular. The laws of New York provide that in such a case as the one then under consideration, viz., when two factions claim the same device or name, the secretary of state shall decide such conflicting claims, "giving preference of device and name to the convention or primary, or committee thereof, recognized by the regularly constituted party authorities." The constitutionality of such laws does not seem to be questioned in the New York case. The case is interesting, if not important, for its bearing upon the claim made here that the State convention de-

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termined between the rival factions in this case. But we are not disposed to follow it, in the absence of a statute requiring courts to settle these questions. See, also, *In re Redmond*, (Sup.) 25 N. Y. Supp. 381, and *In re Pollard*, Id. 385.

As illustrative of the kind of difficulties which arise when the legislature imposes these duties upon the courts, one of the New York cases may be cited, viz., *In re Woodworth*, (Sup.) 16 N. Y. Supp. 147. That was not the first time that the matter there litigated was before the courts, as will be seen later. It was a proceeding under a statute to compel a county clerk to print the names of certain parties claiming to be regularly nominated candidates of the Republican party of the county, and its determination involved an adjudication between rival factions (each claiming to be the regular organization) of the regularity of their respective nominations. At the outset the court expressed reluctance, saying:

"This simple statement of the nature of the duty imposed is sufficient to indicate that it is one from which any judicial officer would gladly escape, were it possible to do so without disregarding the plain mandate of the law-making power of the State."

Objections were filed to the certificates, and passed upon by the county clerk, and then presented to the court, *as the law provided.* The court said that the certificates were regular, and that it was therefore necessary to go into extrinsic facts. These disclosed that the county convention split, and, as there were contesting delegations from four towns, which sent delegates enough to control the convention (in view of the fact that the undisputed delegates were evenly divided), it was only possible to determine which faction had a majority by ascertaining which of the contesting delegations were entitled to seats. This the court proceeded to do by investigating the proceedings at the caucuses. For convenience, we call the respective factions "Patterson" and "Mongin." Each faction had a town committee and a town caucus, and a

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judicial inquiry was had after the caucuses were called, and the same court decided in favor of the Patterson caucus; but the opinion says: "That fact did not deter the Mongin party from holding the caucus which elected Mongin and four others to represent the town of Waterloo in the county convention." Without discussing the details of the caucuses held in the other three towns, we will come at once to the county convention, and here we find a striking resemblance to this case. The opinion states that—

"Previous to the hour appointed for the convening of the convention, a meeting of the county committee was held. This committee, with a single exception, was composed of persons in sympathy with the Mongin wing of the party; and at the meeting in question it was determined to place upon the roll of delegates the names of the Mongin delegates from the towns of Waterloo, Fayette, and Tyre, while the delegation from the town of Varick was made to consist of 5 Patterson delegates, together with 5 other persons, who made no pretense to an election by any caucus whatever, and each of said delegations was given the privilege of casting one-half a vote. It was further determined that the chairman of the committee should call the convention to order, and declare J. B. H. Mongin, of Waterloo, a pretended delegate, whose title was absolutely without foundation, its chairman. It was also determined that no one should be admitted to the hall unless provided with tickets furnished by the committee, and, to carry this provision into effect, policemen were stationed at the door. As thus constituted, the convention, when it assembled, consisted of 15 Mongin and 15 Patterson delegates whose election was not contested; 10 Mongin delegates from the towns of Waterloo and Fayette, who, as it has been made already to appear, had no right upon the floor of the convention; 5 Mongin delegates with half a vote from the town of Varick, who could not, under any circumstances, make any just claim to an election; and 5 Mongin delegates from the town of Tyre, concerning whose election there was, to say the least, grave doubt.

"The programme thus outlined by the action of the county committee was carried out to the letter, and, when an attempt was made on behalf of the Patterson faction to

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substitute the name of a delegate whose title to a seat was uncontested for chairman of the convention, the motion was not entertained by the chairman of the county committee. A committee upon contested seats was then appointed, which committee, within half an hour after its appointment, and without affording an opportunity to any one to be heard, reported in favor of seating the delegates placed upon the roll by the county committee. At this point in the proceedings the delegates from the towns of Ovid, Romulus, Varick, and Junius withdrew from the convention, and organized a separate convention in another place, which was participated in by regularly elected delegates from the towns of Waterloo and Fayette, and also by the Patterson delegates from the town of Tyre; and proceedings were had which resulted in the nomination of persons whose names it is demanded in these proceedings shall be printed upon the official ballot. This body was composed of at least 30 delegates who were duly and fairly elected, while the Johnson Hall convention contained, at most, only 20 whose election, by any stretch of the imagination, can be claimed to be valid. It would seem, therefore, that, within the letter as well as the spirit of the act in question, the former body constituted 'an assemblage of voters or delegates representing' the Republican party of Seneca county.

"But it is insisted that a political convention is a law unto itself, and that whatever methods it adopts for its own government are conclusive, and cannot be made the subject of judicial inquiry. To a certain extent this contention may be, and doubtless is, true. It certainly was presented with the most consummate force and ability by one whose experience in and knowledge of such matters lends great weight to his opinions. But, where the duty is cast upon courts and judges of determining the regularity and fairness of political methods, those methods must be subjected to the same tests as would those of any other body of men whose good faith is questioned; and no court or judge would be justified in sustaining them when found to be inconsistent with that degree of sound morals which must characterize an ordinary affair of business, even though they be recognized and approved by senatorial and state conventions of the same political organizations. The trend of public opinion, as well as of legislation, at the present time, appears to be in favor of a radical reform in our political methods; and it is the plain duty of all good

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citizens, and especially those clothed with judicial authority, to encourage such a sentiment with all the force they can command."

In short, the court assumed to determine who were the lawful delegates, and held that the faction having the largest number of such delegates was entitled to a place upon the ticket, irrespective of the regularity or irregularity of the organization or action of the convention, upon the assumption, we suppose, that it was a deliberative body only in name, whose delegates would blindly vote for the candidate favored, without deliberate consideration of merits.

But the case did not end here. It came again before the same court, and we quote from the opinion:

"The controversy which has resulted in this application is one which arose in the year 1891, between conflicting factions of the Republican party in Seneca county, each of which claimed to be regular in its organization. At the time mentioned, a proceeding similar to this was instituted for the purpose of obtaining a judicial determination of the matter; and, after a careful examination of the papers submitted, I found myself constrained to decide in favor of that element in the party known as the 'Patterson Faction,' and my reasons therefor were stated in an opinion which was designed to cover all the facts of the case. *In re Woodworth*, (Sup.) 16 N. Y. Supp. 147. This decision was subsequently affirmed by the general term (64 Hun, 522), and the following year was approved by my learned associate, Mr. Justice Bradley. Notwithstanding these several adjudications, every state convention, and every judicial, congressional, and senatorial convention of the district in which Seneca county is located, which has been held since they were rendered, has seen fit to ignore the same, and to recognize the opposing or Mongin faction as the only lawful representative of the party. The Patterson delegates have been refused admission to all of these conventions to which delegates were sent, while those of the Mongin faction were received into full fellowship, and the county committee of that faction has been made the custodian of such funds and documents as were distributed by the state committee. This being the situation, I am again asked to determine the question of regu-

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larity upon facts which, other than as above stated, are precisely the same as those which existed at the time the first adjudication was had. The proposition, therefore, which presents itself, is simply this: Shall the precedent which has been established by courts and judges, or that which has been established by political conventions, be followed?

"When this controversy first required a judicial determination, it became necessary to decide it upon such facts as were established by affidavits, unaided by the action of any convention of the party; and, as those facts were thus made to appear, I had no difficulty in reaching the conclusion before mentioned. I am still satisfied that such conclusion was justified, and should now adopt it without hesitation, were it not for the fact that a different one has been so uniformly reached by the party conventions. In determining a question similar to this which arose in Monroe county (*In re Redmond*, 25 N. Y. Supp. 381), where the question of regularity had been passed upon by the state convention of the Democratic party, I have just held that the action of that body must be regarded as conclusive; and I see no reason why the same rule should not obtain in this case. The only difference is that here the state organization did not pass upon the question until after it had been determined judicially; but, nevertheless, both factions submitted their claims to that body and, for the reason stated in the opinion in the *Redmond Case*, I think the defeated party must now acquiesce in its decision. I am aware that this view is at variance with the one expressed by me upon the former hearing, and it likewise appears to be in conflict with that entertained by Mr. Justice Bradley in his opinion in this same matter; but, so far as any contrary view appears in my own opinion, it will be found to be merely the expression of an opinion which was not called for by the facts of the case, and it is one which, upon more deliberate reflection, I am disposed to modify. The conflict between the views here expressed and those of Mr. Justice Bradley is more apparent than real, inasmuch as it now appears that, since his decision was made, the regularity of the Mongin faction has been passed upon by several additional conventions, and that the opposing faction has so far acquiesced in their decisions as to omit in more than one instance to make any further demand for recognition.

"I still think, as already stated, that the title to regularity of the Patterson faction was pretty clearly estab-

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lished upon the original hearing, and that it would, in view of the provision of the statute which authorizes this proceeding, have been no more than courteous for the party conventions to have adopted the decision of the general term, which was deliberately made, after a careful and impartial hearing; but there is no way in which they can be compelled to do so, and consequently it seems to me that the only rule for courts and judges to adopt in this and all similar contests is that they will interfere only in cases where there has been no adjudication of the question of regularity by some division of the party which is conceded to be superior in point of authority to the one in which the contention arose, provided, of course, that the question of good faith in the making of such adjudication is not involved. The adoption of a different rule would inevitably tend to bring party organizations and the courts into unseemly conflicts over questions which are peculiarly within the cognizance of the former tribunals,—a result which most certainly ought, if possible, to be avoided." *In re Pollard*, 25 N. Y. Supp. 385.

Thus, it will be seen that Mongin and politics triumphed over the judicially determined rights of Patterson. A more unseemly and humiliating chapter is not to be found in the history of jurisprudence in this country, and it is all due to the misguided attempt to impose upon the court the duty of presiding over political conventions and caucuses through the medium of actions or proceedings at law, unfitted for the purpose. In the *Case of Fairchild*, 151 N. Y. 359, the matter was not disposed of until after the election, and therefore, when heard and decided, involved only a question of costs.

In the case before us, had issue been joined, and the case sent down for trial of the facts, it is not improbable that it would be still dragging along when the term of office for which the parties are candidates shall have expired.

We have seen that this court held in the *Shields Case* that the tickets of both factions were entitled to places upon the ballot. The same is true in this case, unless we can find a change in the law forbidding it, and requiring us to determine which ticket is entitled to the place.

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Another case where two factions resulted from a regularly called convention is that of *Beck* v. *Wayne Co. Election Com'rs*, 103 Mich. 192. The application prayed that the respondents be required to rescind their action in placing the name of Joseph R. McLaughlin upon the ballot as candidate for senator, and to place thereon the name of Robert Y. Ogg. The application was denied. The court discussed several subjects bearing upon the question which faction had a majority of the delegates, and held that the convention was regularly called, and that, after the retirement of the supporters of Mr. Ogg, a majority of the delegates elect remained, constituting a valid convention, and nominated McLaughlin. The court was able to say this from the undisputed facts upon the record. It might also have denied the writ upon the authority of *Shields* v. *Jacob*, both cases having arisen under the same law. This case does not discuss *Shields* v. *Jacob*, and cannot be said to overrule that case, or even cast doubt upon its correctness, unless it is to be implied from the disposition of the case upon other grounds.

The next case that received the attention of this court was *Baker* v. *Wayne Co. Election Com'rs*, 110 Mich. 635. That was not a case where rival factions asserted an exclusive right to a place upon the ballot, but was a controversy over the question of the order in which the tickets should be placed thereon. The crucial question in the case was whether the party represented by the relator, known as the Democratic People's Union Silver party, was entitled to be printed in the second column as the representative of the Democratic party of the previous election. It was conceded upon all hands that, if it was such representative, it was entitled to second place. The facts upon which the case turned were undisputed, and the question was one of law. The application was denied. Some language in the opinion is thought to have a bearing upon the question before us, and is cited in support of the claim that we have recognized the authority, if not duty, of the commissioners and courts to determine the questions of

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fact upon which the order of tickets upon the ballot depends, and that they must therefore decide all questions of regularity. It is as follows:

"The reluctance of the courts to enter upon an inquiry, or to permit an inquiry by the election commissioners, into the question of fact as to which of two contending factions truly represents a political party, has been manifested in various cases. *State* v. *Allen*, 43 Neb. 651; *Phelps* v. *Piper*, 48 Neb. 724 [33 L. R. A. 53]; *Shields* v. *Jacob*, 88 Mich. 164 [13 L. R. A. 760]. In *Shields* v. *Jacob* it was held that the court would not undertake to determine which of two rival conventions, resulting from a split in a regularly called convention, should be treated as the regular convention of the party; and a *mandamus* was issued requiring the election commissioners to give to both tickets a place upon the ballot. At the time that decision was rendered, however, the provision requiring that the ticket of the party having the greatest number of votes within the county at the last preceding election should be placed first upon the ballot, and that the position of other tickets should be governed relatively by the same rule, was not a part of the statute, and it was not necessary to determine which of these tickets should be placed first on the ballot. Under the law as it now exists, such an investigation seems necessary, and it would seem that the commissioners did determine the question, and place the Shelby ticket second on the ballot."

Two questions were involved in the determination in that case: *First*, the identity of the parties; and, *second*, their previous votes as compared with those of others. About neither of these is there much opportunity for dispute over the facts, and little danger in leaving the subject to the election boards. In that case it was stated that the facts were not in controversy.

We are not dealing with a case in which a candidate has been nominated in a regularly called convention, by a majority of the delegates regularly elected, and admittedly entitled to seats in the convention, or shown by the undisputable evidence to be entitled to seats therein, as was the case in *Beck* v. *Wayne Co. Election Com'rs*, 103 Mich. 192. In such a case the question presented may be a mere

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question of law, and the candidate regularly nominated entitled to a place on the party ticket, to the exclusion of one who may have been nominated by the refractory minority.

It is urged that the statute assigning certain places upon the ballot gives rights to candidates which may be enforced by the court, and that, if the courts may determine the *status* of parties, they may also determine between factions of one party; and the effect of this contention, if sustained, would be to open up the entire field, and make it incumbent upon courts to investigate the regularity, not only of conventions, but caucuses and primaries as well. We think there is a marked distinction between determining the places to be given to two different tickets upon the ballot, and denying to a faction of a party any place whatever. If this claim does not ascribe undue weight to the alleged rights of the candidate, and too little to public interests, it is at least true that judicial methods are too slow, and are inadequate to effectively and justly settle the questions which arise from political contests. Among the dangers that courts should guard against is the unwarranted assumption of power under the false impression that they, and they only, can right all of the wrongs which arise from the conduct of public affairs. They have only such powers and authority as the Constitution and the laws confer upon them. We have seen that several courts have held that not until the intention of the legislature is clearly manifested will they undertake to control political action. We have held in the *Baker Case* that it was the province of the court to decide the *status* of political parties upon admitted facts; but we think it does not follow that it was intended that we should go further, and settle all political controversies. Under the law as expounded in the case of *Shields* v. *Jacob*, the commissioners had no authority to decide between these two factions. It was their duty to print both upon the ballot.

It may be said that under the law of 1895 (Act No. 17,

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Pub. Acts 1895, § 10), providing that "it shall be unlawful for said board of election commissioners to cause to be printed in more than one column on the ballot the name of any candidate who shall have received the nomination by two or more parties or political organizations for the same office," one or the other of the nominees will be at the disadvantage of having his name appear in a column by itself, as in the *Todd Case*. *Todd* v. *Kalamazoo Co. Election Com'rs*, 104 Mich. 485 (29 L. R. A. 330). We think, however, that the public good requires the private inconvenience; and we cannot hold, in the absence of a statute requiring it, that the nominee may stickle for a comparatively unimportant right, to the general public inconvenience to result from his pursuit of an unauthorized remedy of doubtful efficacy and expediency.

It may be asked which of these nominees should be subjected to this disadvantage. Manifestly, we have no means of determining this question, nor can we lay down the rule for such a case as this further than to say that their names should appear in adjoining columns.

It is therefore ordered that the several respondents give to the names of the nominees adjoining columns, said respondents themselves determining which shall be placed upon the general ticket of the Republican party, the other to be in a separate column under the party name and vignette; the full ticket to be placed first upon the ballot. No costs will be allowed.

The other Justices concurred.

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EDGAR *v.* BOARD OF ELECTION COMMISSIONERS OF LIVINGSTON COUNTY.

ELECTIONS—OFFICIAL BALLOT—PARTY TICKETS.

The term "general election," as used in Act No. 271, Pub. Acts 1895, § 14, requiring the board of election commissioners in each county to place first on the official ballot the ticket of the party having the greatest number of votes within the county "at the last preceding general election," must be held to mean the November, and not the April, election, since section 2, subd. 19, 1 How. Stat., requires such construction to be given to the term, "unless inconsistent with the manifest intent of the legislature."

Mandamus by James W. Edgar, chairman of the Republican county committee of Livingston county, to compel the board of election commissioners of said county to place the Republican party ticket first on the official ballot. Submitted October 31, 1898. Writ denied October 31, 1898.

Claude A. Brayton (*J. M. C. Smith, amicus curiæ*), for relator.

L. E. Howlett (*A. A. Ellis*, of counsel), for respondent.

PER CURIAM. Subdivision 19, § 2, 1 How. Stat., provides that the term "general election" means the election held in November, "unless such construction would be inconsistent with the manifest intent of the legislature." There can be no doubt that the election in the spring of 1897 was in a sense a general election, and that general elections are periodically held, under our statutes, at times other than in the month of November. But that does not lessen the force of the statute quoted, or its application to cases growing out of acts which do not indicate that the term was to be given a different meaning from that pro-

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vided by section 2. What is there in this statute (Act No. 271, Pub. Acts 1895, § 14) to remove the presumption which arises from section 2? If nothing, that section must apply. We find nothing in said act to indicate what is meant by the term further than the use of the term, and it must therefore be held to mean the general election held in November.

The writ is denied, without costs.

LOCKTON v. EDWARDS.

INSANE PERSONS—COUNTY CHARGES.

Under 3 How. Stat. § 1930c8, providing that an unrecovered patient, removed temporarily on trial from the insane asylum, shall not forfeit his right to State support "if returned to the asylum within one year from date of removal," such patient, if returned after the expiration of the year, becomes a charge upon the county.

Mandamus by Andrew W. Lockton, prosecuting attorney of Calhoun county, to compel William M. Edwards, medical superintendent of the Michigan Asylum for the Insane at Kalamazoo, to receive an indigent insane person as a State charge. Submitted October 21, 1898. Writ denied November 1, 1898.

Andrew W. Lockton, in pro. per.

Henry E. Chase, Deputy Attorney General, for respondent.

PER CURIAM. The sole question in this case is this: Is an indigent patient, who has been confined in the asylum for the insane at Kalamazoo, and has been removed therefrom as an unrecovered patient, and remained away from

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the asylum more than one year, entitled to be returned to the asylum as a State charge? The statute is as follows:

"An unrecovered patient, removed temporarily on trial, if returned to the asylum within one year from date of removal, shall not forfeit his right to State support." 3 How. Stat. § 1930*c*8.

The patient in this case has been away from the asylum for two years and four months. The usual proceedings were then taken before the probate court to have her adjudged insane, and sent to the asylum. The probate court directed that she be received as a State charge.

The clear implication is that a return within one year is necessary to entitle the patient to be received at the expense of the State. If returned after the expiration of a year, an insane person becomes a charge upon the county. The respondent was right in refusing to admit the patient.

The writ is denied.

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CLARK *v.* VILLAGE OF DAVISON.

1. MUNICIPAL CORPORATIONS — CLAIM FOR PERSONAL INJURIES — VERIFIED STATEMENT — WAIVER — AGREEMENT TO ARBITRATE.
   Presentation to the common council of a village of a verified statement of claim for personal injuries, required by Act No. 3, Pub. Acts 1895, chap. 5, § 7, before suit can be maintained therefor, is not waived by the council's agreeing to arbitrate, if the person injured refuses to proceed under the arbitration agreement.

2. SAME — PLEADING — GENERAL ISSUE.
   In an action against a village for personal injuries, the defense that plaintiff failed to present a verified claim to the village council before commencing suit, as required by Act No. 3, Pub. Acts 1895, chap. 5, § 7, may be asserted under the plea of the general issue.

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Error to Genesee; Wisner, J. Submitted October 4, 1898. Decided November 1, 1898.

Case by William H. Clark against the village of Davison for personal injuries. From a judgment for defendant on verdict directed by the court, plaintiff brings error. Affirmed.

Black & Brown (*Heims & Martin*, of counsel), for appellant.

Ed. S. Lee (*James S. Parker*, of counsel), for appellee.

LONG, J. This action was brought to recover for injuries received on a defective sidewalk. Defendant pleaded the general issue to the declaration filed in the cause. The injury occurred on October 20, 1897, and the suit was commenced on December 6th thereafter. After the plaintiff was sworn in his own behalf on the trial, counsel for defendant objected to any evidence being given in the case, for the reason that the declaration did not set out that the claim made by plaintiff was ever presented to the village council prior to bringing suit. The record is silent as to what disposition the court made of this motion; but the plaintiff was permitted to proceed with his proofs, from which it appeared that on October 20, 1897, while he was passing along the walk on Second street, in the village, he stepped with his right foot on the end of a plank in the walk, when the other end rose up, catching his left foot, and throwing him to the ground, severely injuring his left knee; that, the next morning after the injury, he sent for two members of the council, who were members of the sidewalk committee; that they came to see him, and examined his knee; and that, on November 10th following, a resolution was unanimously carried by the common council of the village, as follows:

"Moved by trustee Hurd that the president and clerk consult with Mr. William H. Clark in regard to injuries claimed by him to have been received in a fall upon a de-

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fective sidewalk in the village of Davison, and obtain the consent to settle said claim, provided such claim is proven; such settlement to be made with the village of Davison by a board of arbitration, and entering into bonds for said settlement."

It appeared, further, that the president and clerk of the village called on plaintiff thereafter, and an agreement to arbitrate was entered into, and signed by the parties; that a bond was also drawn up to be signed, and the arbitrators were agreed upon; that plaintiff failed to procure a surety on the bond; that the time was set for the arbitrators to meet, but that they failed to meet at the time fixed; that an agreement was then made to arbitrate without plaintiff's giving a bond; that thereafter plaintiff refused to arbitrate, and notified the members of the council that he should take the matter into court. It also appeared that the plaintiff failed to file any verified statement of his demand with the council, as required by Act No. 3, Pub. Acts 1895. Thereupon the court directed the verdict in favor of defendant.

Plaintiff now contends:

1. That the action of the council in passing the resolution to settle the matter by arbitration, and the agreement entered into to arbitrate, amounted to a waiver of the right to have a verified statement of the demand from the plaintiff, or, at least, that it was a question for the determination of the jury whether the action taken amounted to a waiver of that right.

2. That the defendant, having pleaded the general issue, without setting forth any notice that it would insist on the trial that the notice was necessary, waived this defense.

Section 7 of chapter 5 of the village act of 1895, above referred to, provides:

"It shall be a sufficient defense in any court to any action or proceeding for the collection of any demand or claim against the village, for personal injuries or otherwise, that it has never been presented, certified to or verified as aforesaid, to the council for allowance."

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The preceding portion of the same section provides:

"The council shall audit and allow all accounts chargeable against the village; but no account or claim or contract shall be received for audit or allowance unless it shall be accompanied with a certificate of an officer of the corporation, or an affidavit of the person rendering it, to the effect that he verily believes that the services therein charged have been actually performed or the property delivered for the village, that the sums charged therefor are reasonable and just, and that, to the best of his knowledge and belief, no set-off exists nor payment has been made on account thereof, except such as are indorsed or referred to in such account or claim; and every such account shall exhibit in detail all the items making up the amount claimed, and the true date of each."

It will be noticed that this section of the statute is almost identical with section 20, chap. 8, Act No. 215, Pub. Acts 1895, which is cited and construed in *Griswold* v. *City of Ludington*, 116 Mich. 411. In that case it was held that—

"It is the evident intent of the legislature, by these sections of the charter, to compel all parties having claims against a city to make a statement of the claim under oath, or to obtain the certificate of an officer of the corporation certifying to the correctness of the claim; and, until this is done, no action can be commenced or maintained."

The provisions of a similar charter were passed upon in the case of *Springer* v. *City of Detroit*, 102 Mich. 300. In that case the declaration did not contain any allegation that the claim had been presented to the common council, and the proofs disclosed the fact that none had ever been so presented. The plaintiff having recovered below, the judgment was reversed in this court, and a new trial awarded.

But counsel contend, as we have stated, that these provisions of the statute have been waived by the village authorities. It is claimed that the case falls within *Canfield* v. *City of Jackson*, 112 Mich. 120; that as good cause exists here for holding that the provisions of the statute

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have been waived as in that case. But in the *Canfield Case* no claim was made under the statute by the defendant until after verdict and judgment, and then only on motion for new trial, which this court held to be too late. That case was not like the present; nor is it like the case of *Germaine* v. *City of Muskegon*, 105 Mich. 213, where the claim was not rejected for the reason it was not properly verified; nor *Griswold* v. *City of Ludington*, *supra*. Here the parties proposed to submit to arbitration. The village stood ready to try the case in that way, even without the plaintiff's giving the bond which was first agreed to be given by him. Arbitrators were agreed upon, when the plaintiff refused to go on, and soon thereafter commenced this suit. It is difficult to understand how, under these facts, it can be claimed that the village council waived the provisions of this act. If the arbitration had taken place without the village authorities insisting upon the verified claim being filed, the case would have undoubtedly fallen within the rule of *Canfield* v. *City of Jackson*, *supra;* but the plaintiff himself put a stop to these proceedings, and commenced his suit within 47 days after the injuries were received, without filing a sworn statement. Under these circumstances, the court very properly held that there was no evidence to be submitted to the jury on the question of waiver.

The second point made—that is, that the plea contained no notice of statutory defense—has no force whatever. This fact can be shown under the plea of the general issue. This requirement of the statute is for the benefit of the village, and is a matter which may be used by it by way of defense. *Wright* v. *Village of Portland*, *ante*, 23.

The judgment below must be affirmed.

The other Justices concurred.

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MOORE v. TOWNSHIP OF HAZELTON.

1. BRIDGES—DEFECTS—NOTICE TO TOWNSHIP.
   Notice to the contractor of a township bridge that it is being built of defective material is not notice to the township.

2. SAME—LAPSE OF SUFFICIENT TIME TO REPAIR—PRESUMPTIONS.
   One may properly presume, in the absence of any knowledge or indication to the contrary, that a township has repaired a weak and shaky bridge after the lapse of a year from the time that it was known to be in that condition.

3. SAME—KNOWLEDGE OF CONTINUING DEFECT—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.
   The question whether a thresher, who sustained damages by reason of such a bridge, had such knowledge, or opportunity of knowing, of the continuance of the defect as would render him guilty of contributory negligence in driving his machine upon the bridge, was for the jury, under proper instructions.

4. SAME—WITNESSES—CROSS-EXAMINATION.
   In an action against a township for damages caused by the giving way of a bridge under a threshing outfit, the plaintiff, who had knowledge the year before the accident that the bridge was weak and shaky, was properly asked on cross-examination whether he did not think it was an act of carelessness to attempt to cross the bridge without first examining it to see whether, in his judgment, it was strong enough to sustain the weight of the machinery.

5. SAME—DUTY OF TOWNSHIP.
   While townships must construct bridges sufficiently strong to meet the ordinary requirements of travel in the community, they are not obliged to provide structures that will sustain loads that could not reasonably be anticipated.

6. SAME—THRESHING OUTFITS.
   Whether a ten-horse traction engine and tank full of water was such a load was a proper question for the jury.

Error to Shiawassee; Smith, J. Submitted October 4, 1898. Decided November 1, 1898.

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Case by Nathan Moore and James Moore against the township of Hazelton for damages caused by a defective bridge. From a judgment for plaintiffs, defendant brings error. Reversed.

A. L. Chandler (*George R. Gold*, of counsel), for appellant.

Watson & Chapman, for appellees.

HOOKER, J. The plaintiffs recovered a judgment for damages resulting from an injury to a steam threshing machine outfit, occasioned by the fall of a bridge upon which it was crossing a stream. It was claimed that the bridge was out of repair and unsafe, and that the timbers were rotten. The jury must have found that the load placed upon the bridge by the plaintiffs was not extraordinary for that vicinity, and that the township had actual or constructive notice of the weakness of the bridge, and was negligent in permitting it to go unrepaired. The contract for building the bridge was let some years before to one Austin, who hired a man named Garner to work upon it. Garner testified that in boring a hole through a timber—which there was evidence tending to show to have been the piece used for the needle beam, which is alleged to have given way—the bit stopped drawing, and he then turned it, and bored from the other way, when he met the same difficulty; that it was owing to a condition of dry rot; that he informed Austin of it, who said the timber should be put in; and a bolt was obtained, and driven through the stick where the auger failed to do its work, and the stick was used in the bridge. He also testified to another conversation upon the subject at the supper table, in the presence of his brother's wife. Mrs. Garner was called by the plaintiff, and she testified that on the latter occasion the following occurred:

"I remember of a talk between George Garner and Mr. Austin about a stick of timber they put in the bridge. It was at the supper table one night. They came home to

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supper, and during the eating of the supper George says to Mr. Austin, he says: 'Andrew,' he called him, 'it is a shame to put that stick of timber into that bridge, for,' he says, 'it is rotten.' Mr. Austin says, 'Never mind, I will risk but what I will get it accepted;' and that was the conversation exactly.

"*Mr. Chandler:* I move to strike out this testimony as being incompetent and immaterial, and in no way binding the township.

"*The Court:* What position did Mr. Austin occupy at that time?

"*Mr. Chapman:* He had taken the contract from the township to build this bridge. They had let it to him.

"*The Court:* As an admission it would not bind the township, but as a matter of notice it would. I will let it stand.

"*Mr. Richards:* What the contractor may do or say would not bind the town.

"*The Court:* If Mr. Austin was there, having charge of the work on the defendant's highway,—having charge of public work,—I think there would be a presumption there that he was helping, and doing it in the interest of the defendant. Now, the fact that such a person, in such a position, had notice of what was being done, would be competent for the purpose of showing notice only, but not as any admission by the township. I will deny the motion. (Exception for defendant.)

"*Cross-examination by Mr. Chandler:* I don't remember anything more that was said there about the bridge at that time. I was there all the time during the supper hour.

"*The Court:* I think, gentlemen, that the fact that Mr. Austin was informed of the condition of the timber might stand, but as to what Mr. Austin said about it may be stricken out of this witness' testimony.

"*Mr. Chandler:* I move to strike it out,—all of it.

"*The Court:* I will strike out what Austin said about it, but let the fact stand that Austin was notified in regard to that stick of timber. (Exception for defendant.)"

Austin was not an officer of the town at that time, that we discover, but merely one who had contracted to build the bridge; and we think that notice to him that the bridge was not properly built would not be notice to the town that the bridge was weak, nor would this conversa-

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tion between Austin and Garner at the supper table be proper evidence to prove that it was so.

Among other questions in the case was that of contributory negligence. There was some evidence tending to show that, a year before, the plaintiffs knew that the bridge was weak and shaky, and that one of the stringers was out of place, and that one of them took an ax, and drove it into position, before going upon the bridge. The defendant's counsel offered the following request:

"If you find the plaintiffs crossed this bridge, with the engine, the year before the alleged accident, and that the bridge at that time shook and gave evidence of weakness, and if such shaky and weakened condition of the bridge was then known to the plaintiffs, or either of them, in the absence of actual knowledge by them that the bridge had been subsequently repaired, they would have no right to presume that it had been repaired, and it would be negligence for the plaintiffs to draw their engine on said bridge without first inspecting its condition; and, if they drove the engine on the bridge without inspecting it, they placed themselves in a place of danger,—they took their chances on getting safely over the bridge,—and, if they were injured in so doing, they cannot recover in this case."

The judge refused this request, and instructed the jury as follows:

"'If the bridge had been out of repair the year before, and the plaintiffs did know it, they would have a right to presume that the township had put the bridge in a reasonable repair before the following year.' * * *

"'If plaintiffs, or either of them, had actual knowledge, or if they, or either of them, were in possession of such facts or matters or circumstances or information concerning the condition of this bridge at the time of the alleged injury as would put reasonable, careful, and prudent men upon inquiry as to whether this bridge was out of repair, and not in a condition reasonably safe for them to drive their engine upon, it would be negligence for them to drive their engine upon the bridge without first making careful examination for the purpose of determining whether said bridge, at the time of the alleged injury, was safe for them to drive their engine upon.'

"The fifth I give with some interlineation: 'If the plain-

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tiffs, or either of them, knew, or if they were in possession of such facts relative to the condition of this bridge at the time of the alleged injury as would put reasonable, careful, and prudent men upon inquiry as to the strength and safety of this bridge, and its condition of repair, it would, under such circumstances, be negligence of the plaintiffs to attempt to drive their engine upon and over the bridge (I have added the words, "without inspecting it"); and if, under such circumstances, they did drive the engine upon the bridge, and their engine was broken and damaged by the breaking down of the bridge and the falling of the engine into the creek, the plaintiffs cannot recover in this case, and your verdict must be for the defendant, "No cause of action."'

"The sixth: 'I instruct you that, although you may believe from the evidence that the defendant township had negligently suffered this bridge to be and remain in an unsafe condition for driving traction engines upon and over it, still, if you also believe from the evidence that such unsafe condition of the bridge was known to the plaintiffs, or either of them, before and at the time they attempted to drive their engine upon and over the bridge, and if, knowing that said bridge was unsafe and out of repair, they attempted to drive their engine upon and over said bridge (I will add, "and did drive it upon the bridge"), they would not be using due care and prudence to avoid an injury, which the law in this State requires, but plaintiffs would, in such case, be guilty of (I have added the word "contributory") negligence; and, if you so find the facts to be, you must find a verdict for the defendant, "No cause of action."'"

Taken together, we think the instructions fair. The latter sentences qualified the instruction that the plaintiffs had a right to presume that the bridge had been repaired, if such qualification was necessary. We think that, in the absence of any knowledge upon the subject, or anything apparent to observation that should lead to a contrary opinion, it may be presumed that a township has repaired a weak and shaky bridge after the lapse of a year from the time that it was known to be in that condition; but it was eminently proper to submit to the jury the question of the plaintiffs' knowledge, and opportunities for knowing, that it had not been repaired. We think no

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error was committed in refusing defendant's request, or in the instructions given.

On cross-examination one of the plaintiffs was asked the following:

"*Q.* Do you say in your judgment it was not carelessness to drive a load of that dimension on that bridge without first examining the strength of it, to see whether it would hold or not, in your judgment? (Objected to, as witness had a right to assume the bridge was strong enough to run an ordinary threshing engine over it in that manner.)

"*The Court:* I think that is a matter of law. (Exception for defendant.)"

This was a proper question to ask the plaintiff on cross-examination.

A witness for the defendant was asked whether, in his opinion, a ten-horse engine, with a tank full of water attached, was an extraordinary load in that vicinity, and his answer was excluded. Unless we are to say that townships must construct bridges suitable to sustain the weight of any load that may be put upon them, we must say that they must provide only for the ordinary wants of travel in such communities. We recognize the right to use traction engines upon the highways, and the necessity for townships to keep abreast of the improvements of the age, and the necessity for better and stronger bridges now than in earlier times. The obligation is, however, to provide reasonably safe bridges under existing conditions, and they are not liable for a failure to provide structures that will sustain loads that could not reasonably be anticipated. Whether a ten-horse engine and tank full of water constituted such a load was a question of fact, and it was proper to take testimony upon the subject. The plaintiffs were allowed to testify that other engines as large or larger frequented the highways of the township, and the defendant should have been allowed to introduce testimony to the contrary.

The judgment is reversed, and a new trial ordered.

The other Justices concurred.

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BAKER *v.* MICHIGAN MUTUAL PROTECTIVE ASSOCIATION.

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1. LIFE INSURANCE — ASSESSMENTS — PLACE OF PAYMENT — FORFEITURE.

   Failure of insured to make a monthly payment on a life-insurance policy does not work a forfeiture, where, at the issuing of the policy, the agent stated that the company would send a collector to the insured's house between the 1st and 10th of each month, to whom the monthly payments should be made, and the insured had the money ready for such collector, who failed to come, and no notification was received that payments should or might be made elsewhere.

2. SAME — ACTION ON POLICY — SPECIAL DEFENSES — AMENDMENT OF PLEA — DISCRETION OF COURT.

   Refusal of the trial judge to permit an insurance company, in an action against it on its policy, to amend its plea of the general issue, on the statement of counsel that a special defense was first made known by the cross-examination of the plaintiff, is not an abuse of discretion, where, from the questions propounded on the cross-examination, it is apparent that some thought of such defense must have been entertained, and preparation made therefor, before the trial, and the refusal to pay the loss, which was small, was based upon an entirely distinct claim.

Error to Kalamazoo; Buck, J. Submitted October 4, 1898. Decided November 1, 1898.

Assumpsit by Ella Baker against the Michigan Mutual Protective Association on a policy of life insurance. From a judgment for plaintiff, defendant brings error. Affirmed.

N. H. Stewart, for appellant.

Howard, Roos & Howard, for appellee.

MONTGOMERY, J. The plaintiff is the beneficiary named in an insurance policy issued by the defendant.

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On a trial before a jury, she recovered a verdict of $104.50, and defendant brings error.

The policy was issued December 3, 1896, and the assessment for that month paid. The assured died on the 14th of January, 1897, after the second monthly payment became due, and while the amount remained unpaid. The plaintiff was therefore not entitled to recover unless the default in making this payment is excused. The plaintiff introduced testimony tending to show that, at the time the policy was taken out, the agent of the company stated to plaintiff that the company would send a collector to the house of the assured between the 1st and 10th of each month, and that payments could and should be made to such collector; that the deceased had the money ready for such collector, but that none came; and that no notification was received that the dues should or might be paid elsewhere. Plaintiff's husband was taken sick, and died on the 14th, and the plaintiff afterwards, learning that the company had an agent in the city, tendered the dues to him, but he refused to receive them. The circuit judge instructed the jury, in substance, that, if they found this claimed state of facts to exist, the policy did not lapse because of the delay in making payments. We think this instruction a correct statement of the law. If the plaintiff's testimony on this point was true,—and the jury so found,—it would be a gross injustice to permit the company to profit by its own default in calling for the dues. The place of payment was the home of the assured, and no other was known to plaintiff. Even when the right to make payment at the residence depends upon custom, good faith requires that this custom should not be discontinued, and payment required at the office of the society, without notice to the assured. Nibl. Acc. Ins. & Ben. Soc. (2d Ed.) § 299.

Defendant sought to show that the plaintiff had made certain misrepresentations and warranties at the time the policy was issued. The circuit judge ruled out this testimony as not admissible under the pleadings. The plea

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was simply the general issue, and the ruling was clearly right, under paragraph *d*, Cir. Ct. Rule No. 7. The defendant, after the main testimony for the defense had been introduced, asked leave to amend. No showing under oath was made, but counsel stated that the defense was first made known by the cross-examination of the plaintiff. It appeared, however, by some of the questions propounded on cross-examination, that some thought of such a defense must have been entertained before the trial, and some preparation made along these lines. Besides this, other considerations may have influenced the action of the trial judge,—the fact that the amount involved was small, and that the refusal to pay the loss had been put upon the single ground that the policy had lapsed. Under these circumstances, we are not prepared to hold that the refusal to permit an amendment was such a clear abuse of discretion as justifies us in reversing the case. *King* v. *Wayne Circuit Judge*, 41 Mich. 727.

The judgment is affirmed, with costs.

The other Justices concurred.

WALBRIDGE *v.* BARRETT.

1. ATTORNEY AND CLIENT — ACTION FOR SERVICES — PREMATURE COMMENCEMENT.

   Plaintiff, an attorney, agreed to perform certain services for defendant in and about a suit at law, for which he was to receive no pay until a judgment was obtained and the case settled. After judgment in the client's favor, the money was placed by the adverse party in the hands of attorneys, to be paid over to the judgment creditor. A dispute having arisen meantime over the amount of plaintiff's claim, he brought suit. *Held*, that it was not premature.

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2. SAME—COMPENSATION CONTINGENT ON SUCCESS.
The fact that services rendered by an attorney under an agreement to charge what they are actually worth are performed with the further understanding that, unless he recovers judgment in his client's favor, he is to receive no compensation at all, has no bearing in determining the amount to which he is entitled if successful.

3. SAME—ATTEMPTED SETTLEMENT—HEARSAY.
Evidence tending to show that an attorney, before bringing suit against a client for professional services, attempted to bring about an adjustment of their differences, is inadmissible in such suit; and the introduction of proof, as tending to show such attempted adjustment, of the declarations, brought home to the client by the plaintiff, of the judge in whose court the services were rendered, that the attorney ought to have half of the judgment recovered before him as compensation for his services, is prejudicial error.

4. EVIDENCE—OFFER OF JUDGMENT—WITNESSES.
A defendant who has testified, on cross-examination, that he never tendered a certain amount in court, cannot be shown an unaccepted written offer of judgment, and asked if he ever made an offer of such amount, since such a proceeding places the writing before the jury as effectually as if it were read in evidence, in contravention of 2 How. Stat. § 7372, which provides that such an offer, if unaccepted, is to be deemed withdrawn, and "cannot be given in evidence."

5. SAME—ATTORNEY'S SERVICES—VALUE—INSTRUCTIONS.
Refusing an instruction, in an action by an attorney against his client to recover for services rendered, that the opinions of lawyers who testified as to the value of the services are not conclusive, is erroneous, where there was other evidence bearing upon the question of such value. *Wood* v. *Barker*, 49 Mich. 295, distinguished.

Error to superior court of Grand Rapids; Burlingame, J. Submitted October 5, 1898. Decided November 1, 1898.

Assumpsit by Edward L. Walbridge and James T. McAllister against Ervin E. Barrett for services as attorneys at law. From a judgment for plaintiffs, defendant brings error. Reversed.

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Bundy & Travis, for appellant.

J. Byron Judkins (*Henry E. Walbridge*, of counsel), for appellees.

GRANT, C. J. Plaintiffs are attorneys, bringing suit to recover for their services rendered for defendant in and about a suit brought by him against the Grand Rapids Veneer Works. Defendant was defeated in that suit in the circuit court, appealed it to this court, and obtained a reversal. *Barrett* v. *Grand Rapids Veneer Works*, 110 Mich. 6. The case was again tried in the circuit, resulting in a verdict and judgment for plaintiff for $6,198.40, and costs, taxed at $646. Defendant disputed plaintiffs' claim, and this suit followed. Plaintiffs obtained a verdict and judgment for $1,130.50. The testimony, so far as is material, will be stated in connection with the points determined.

1. Defendant requested the court to direct a verdict for him, on the ground that the action was prematurely brought. This request was based upon the contract for services as stated by plaintiffs,—that they were to receive no pay for their services until a judgment was obtained and the case settled. A settlement of the case was made on May 17, 1897, and a check of the veneer company for the amount given to its attorneys, to be paid to Mr. Barrett. Meanwhile the dispute arose over the amount of plaintiffs' claim for services. Plaintiffs had employed other attorneys, and were endeavoring to obtain the money. Under these circumstances, the request was properly refused.

2. There was evidence tending to show that plaintiffs refused to take the case upon commission, but agreed to charge nothing unless they obtained a judgment, and, if they obtained a judgment, were to receive what their services were worth. Several witnesses were asked to state what would be a reasonable charge for plaintiffs' services, rendered "with the express understanding that, unless they finally recovered judgment in the case, they were to

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get nothing." This testimony was incompetent. They agreed to charge what their services were worth. They were worth no more and no less because of the agreement to charge nothing unless they were successful. A carpenter or plumber or machinist who agrees to do a certain piece of work upon the agreement that, if he does not accomplish the purpose in view, he shall receive nothing, but, if he does, he is to receive what his services are worth, can recover no more than their actual worth. The value of his services is not enhanced or lessened by the contingency. An agreement made by a lawyer stands upon no different basis.

3. The case of Barrett against the veneering company was tried before Judge Adsit. Plaintiff Walbridge was permitted to testify that he told Barrett that Judge Adsit had told Mr. McAllister that plaintiffs ought to have half of the judgment as a compensation. The sole ground upon which plaintiffs defend the competency of this evidence is that they had a right to show what inducement and influence they had used with defendant to bring about an adjustment without litigation. We cannot concur in this view. It was immaterial what efforts had been made to adjust their differences. The attempt had failed, and the sole questions were, What was the agreement, and how much were their services worth? The opinion of the judge who tried the case, though hearsay, might have great influence with the jury.

4. On cross-examination defendant testified that the balance due the plaintiffs was about $350. He was asked if he had not claimed it to be $526. He replied that he had not, and denied that he had ever tendered "that amount in court." Plaintiffs' counsel then handed him a written offer of judgment filed in the case, made under 2 How. Stat. § 7372, which provides: "If the notice of acceptance be not given, the offer is to be deemed withdrawn, and cannot be given in evidence," and asked if he ever made them an offer of $526. After objection and exception the witness replied: "Under certain circum-

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stances, I did; yes, sir." The offer was not read to the jury, and counsel offered it to contradict his statement that he had never tendered that amount in court. The entire subject was brought out upon cross-examination. The jury must have understood that this was a written offer, and contained the tender of the amount. It was as effectually before the jury, and just as damaging, as though the written document had been offered in evidence. It was clearly incompetent.

5. Some attorneys testified as experts to the value of plaintiffs' services. Defendant requested the court to charge:

"You are the judges of the value of plaintiffs' services. The opinions of the lawyers who have testified as to such value are not conclusive, but merely advisory. If you find it necessary in this case to pass upon the question of the value of any of the services, you, as jurors, must use your own judgment in determining such value, taking into consideration all the evidence in the case bearing thereon."

The court refused this request, and instructed the jury that they must determine from the sworn evidence in the case how much was justly due. Had there been no testimony of the value of plaintiffs' services aside from that of the attorneys, the case would undoubtedly have been ruled by *Wood* v. *Barker*, 49 Mich. 295; but there was other evidence bearing upon the value of the services. Bills had been rendered amounting to less than that claimed upon the trial. There were conversations between plaintiffs and defendant, and also agreements for *per diem* charges. The bill of exceptions which plaintiffs had prepared was in evidence, together with their statement of the time spent in preparing it. Under these circumstances, the rule in *Wood* v. *Barker* was not applicable, and the court should have instructed the jury that the opinions of the attorneys were not conclusive. 2 Jones, Ev. § 389; *Moore* v. *Ellis*, 89 Wis. 108; *Johnson* v. *Railroad Co.*, 37 Minn. 519.

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6. Mr. H. E. Walbridge, an attorney, and brother of plaintiff Walbridge, had assisted upon the first trial and in preparing the case for the Supreme Court. Defendant had negotiations with him in regard to assisting and taking the main management at the second trial. These negotiations fell through. Mr. H. E. Walbridge was permitted to testify to these negotiations, and to produce certain letters passing between him and defendant. They had no relevancy to the issue involved in this case, and should have been excluded. They contained statements which might have prejudiced the defendant. It was competent for Mr. Walbridge to testify to the time spent in preparing and trying the case, his knowledge of what plaintiffs did, and give his opinion of the value of the services.

Other objections are raised, but we find no error in them.

Judgment reversed, and new trial ordered.

The other Justices concurred.

KELSEY *v.* MING.

118 438
s 120 458

1. MORTGAGES—IRREGULAR FORECLOSURE—RIGHTS OF PURCHASER.
An irregular foreclosure sale does not extinguish the mortgage, but operates to transfer to the purchaser the rights of the mortgagee.

2. REPLEVIN—JUDGMENT—PRIORITY OF LIENS.
Valid liens existing upon replevied property at the time the suit was commenced are not extinguished, nor is their priority affected, by the exercise by the defendant of his right to waive a return of the property, and have its value assessed, since this right is expressly declared by the statute conferring it (2 How. Stat. § 8347) to be subject to section 8342, providing that, where either party to an action in replevin has a lien upon the property, such fact shall be determined, and such judgment shall be rendered as shall be just between the parties.

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Error to Cheboygan; Adams, J. Submitted October 5, 1898. Decided November 1, 1898.

Replevin by Eber L. Kelsey against Fred R. Ming. From a judgment for defendant on verdict directed by the court, plaintiff brings error. Reversed.

Frost & Sprague (*Moore & Moore*, of counsel), for appellant.

Humphrey & Grant, for appellee.

MOORE, J. In October, 1895, Charles E. Kelsey executed a mortgage upon a quantity of lumber, to the Union Trust Company, as trustee, to secure a debt due the plaintiff of $13,000, and one to Charles L. Kelsey of upwards of $2,000, and stated the lumber was clear of all liens, "except possible legal liens for saw bills," etc. The lumber was then piled upon the docks belonging to the owners of the mills where the lumber was cut. This mortgage was properly filed. In December following, a writ of attachment against Charles E. Kelsey was placed in the hands of defendant, who was sheriff of the county, and, by virtue of his writ, he levied upon the lumber in question. Afterwards a judgment was obtained in this attachment suit. In April, 1896, the mortgagee attempted to foreclose the mortgage, and sold the property by mortgage sale, subject to the liens for saw bills, to the plaintiff in this case, for about $9,000. It is the claim of plaintiff that he afterwards paid the saw-bill liens, amounting to upwards of $4,000. After the sale, he caused a demand to be made upon the sheriff for the lumber, and, upon his refusal to give it up, commenced this action in replevin.

It was the claim of defendant upon the trial that the mortgage was void as to the creditors of Charles E. Kelsey, and that the foreclosure proceedings were so defective that plaintiff did not obtain title. The plaintiff asked the judge to direct a verdict in his favor. He declined to do so, but directed a verdict in favor of defendant for two reasons:

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"1. That there is no sufficient evidence that the notices of sale provided by said mortgage and by law were given prior to the making of the sale.

"2. That at the time of said sale the property pretended to be sold was not in the possession of the person making said sale, but was held adversely to him by the defendant in this suit, as sheriff, under a writ of attachment, and that the plaintiff in this case is not entitled to recover."

He also instructed them as follows:

"Your verdict must be in favor of the defendant for the amount of the defendant's lien, the defendant having waived a return of the property; and the amount of the lien is the judgment and the costs and the interest, amounting to $10,078.57. You will render a verdict in favor of the defendant for that amount."

Exceptions were taken by plaintiff to this action of the judge, and error is assigned.

There was sufficient testimony of the posting of the notices of sale so the question should have been submitted to the jury; but, as the notice itself is not in the record, we are not able to say the court erred in instructing the jury there had been no compliance with the provisions of the mortgage in relation to the notices of sale.

It is claimed by plaintiff that, even if the sale was defective, he succeeded to the rights of the mortgagee, and had a lien upon the lumber to the amount due upon the mortgage; that he also had a lien upon the lumber for the saw bills; that these liens were prior to the lien of the sheriff, and, as they amounted to the value of the lumber, defendant was entitled to only nominal damages. The record does not disclose when, or the circumstances under which, the saw bills were paid; so we are unable to decide whether the lien for saw bills was discharged or not. The record shows a dispute as to the validity of the chattel mortgage. This raised a question of fact; and, as it was not submitted to the jury, we cannot say whether the mortgage was void as to creditors or not. If it was a valid mortgage, it was not extinguished by an irregular sale, but the purchaser would succeed to the rights of

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the mortgagee. Jones, Chat. Mortg. § 811; *Gilbert* v. *Cooley*, Walk. Ch. 494; *Lillibridge* v. *Tregent*, 30 Mich. 105; *Hoffman* v. *Harrington*, 33 Mich. 392; *Lyle* v. *Palmer*, 42 Mich. 314; *Morse* v. *Byam*, 55 Mich. 594; *Rose* v. *Page*, 82 Mich. 105.

Defendant urges that, as plaintiff claimed in the court below to be the owner of the property, he cannot now claim to be a lienor. The plaintiff duly excepted to the action of the circuit judge in directing a verdict for the amount of the judgment and costs which were obtained in the attachment case. If the plaintiff was not entitled to the possession of the property, defendant was entitled to its return. If it was returned to him, no one would claim that it would be discharged of the valid liens which existed at the time the replevin suit was commenced, or that their priority would be affected. Is it possible such a result can be worked out by simply waiving a return of the property? The right to waive a return of the property, and to have its value assessed, is given in 2 How. Stat. § 8347. This section expressly provides that the right shall be subject to the provisions of section 8342; and this section provides that, where either of the parties has a lien or part ownership in the property, that fact shall be determined, and such judgment shall be entered as shall be just between the parties. If it is true, as claimed by plaintiff, that this chattel mortgage and the saw bills were liens upon the property at the time the levy was made, and that he had succeeded to the rights of the mortgagee and the lienors, it would not be just to render such judgment as was directed in this case.

We do not deem it necessary to discuss the other questions, for they are not likely to arise in a new trial.

Judgment is reversed, and new trial ordered.

The other Justices concurred.

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SLOMAN *v.* GOEBEL BREWING CO.

TRIAL—INSTRUCTIONS—REQUESTS TO CHARGE.

Refusal of requested instructions is not error where the court has properly stated the rules of law applicable to the case, and fairly submitted the questions involved.

Error to Wayne; Frazer, J. Submitted October 6, 1898. Decided November 1, 1898.

Garnishment proceedings by Morris H. Sloman against the Goebel Brewing Company, as garnishee of Louis J. Ouellette. From a judgment for defendant, plaintiff brings error. Affirmed.

Sloman & Groesbeck (*Emanuel T. Berger*, of counsel), for appellant.

Ralph Phelps, Jr. (*William B. Jackson*, of counsel), for appellee.

MOORE, J. The plaintiff had a claim against Louis J. Ouellette, which he sued, and upon which he afterwards recovered judgment. He also garnished the Goebel Brewing Company, and from a judgment in favor of defendant he has appealed.

In 1895, Ouellette was engaged in the saloon business in Detroit. During a portion of June and July, 1895, he had a bar and restaurant at the Detroit Driving Club during the races. The garnishee defendant paid for him a license fee of $500, and became his surety to the driving club to the amount of $5,000 for the payment of the rent, which was $750 a day. The brewing company also furnished Ouellette with a large amount of beer, and others furnished other supplies. By agreement of the parties, one Flynn, who was paid by Ouellette, received the money

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resulting from the business, and paid the rent, and handed the balance of the receipts to the attorney of the brewing company. During June plaintiff consigned to Ouellette about $2,400 worth of wines and liquors. July 9th, Mr. Ouellette was indebted to the Goebel Brewing Company, to Harrington & Ouellette, and to Barclay Smith. He gave to them a note for $2,000, due August 1st, and to secure its payment executed a mortgage on all his stock and property at the driving club, except the goods bought of the plaintiff, and, by consent of the mortgagor and mortgagees, Flynn managed the business, and continued to do so until the races ended. The plaintiff found and took possession of about one-half of the goods consigned by him, but could not find $1,100 or $1,200 worth of them. July 25th he sued out a writ of attachment, and levied upon the stock. Before the stock was removed, and on the same day it was levied upon, it was agreed verbally that the attachment should be released upon the payment of $150, which was paid, and that on the following morning some arrangement should be made at the office of the attorney of the brewing company as to the disposition of the balance of the claim. During the night Ouellette made a bill of sale of all the property to the Goebel Brewing Company, and when the parties met at the office of the attorney, according to the agreement made the day before, the brewing company claimed to be in possession of the property by virtue of the bill of sale. On the same day suit was brought by the plaintiff, and a garnishee process was served upon the brewing company, which made a disclosure denying it had any property, money, or effects, or was indebted to Ouellette. An issue was framed, and tried by a jury, who found in favor of defendant.

It is claimed the trial judge erred in refusing to give plaintiff's requests. The court endeavored to instruct the jury, in a general charge, as to the law applicable to the case, and refused all of the plaintiff's requests. His charge was quite full, and properly stated the law in relation to

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the matters to which his attention was directed by the requests to charge. It will be necessary to consider but two requests.

The judge was asked to charge the jury:

"On the other branch of the case, I charge you that, whether the Goebel Brewing Company received or obtained property under the circumstances which I have stated or not, if you find that, at the time of the service of the writ of garnishment in this case upon it, it was in possession of goods, credits, chattels, moneys, or effects belonging to the defendant Ouellette, upon which it had no superior lien or claim, or at that time was indebted to Ouellette, then the plaintiff is entitled to recover the amount and value thereof."

In his charge he failed to say anything to the jury about the liability of the brewing company in case it was indebted to Ouellette. Was this error? The affidavit for the writ was based, not only upon the possession of money and property, but also upon the indebtedness of the brewing company to Ouellette. As already stated, the disclosure made by the company denied it had any money or property belonging to Ouellette, or was indebted to him. The record shows that when the chattel mortgage was given, July 9th, Ouellette was indebted to the brewing company in a large amount, and it also shows he was indebted July 25th, when the attachment was released. There was nothing said in the progress of the trial, by counsel or witnesses, from which it would be inferred there was any claim of liability except for goods, chattels, moneys, or effects which came into the hands of the brewing company under the proceedings already stated, and this will doubtless account for the court not having more to say in his charge in relation to any indebtedness of the brewing company.

The court was asked to charge the jury as follows:

"The plaintiff claims in this case to recover upon two grounds: *First*, he claims that, at the time of the service of the writ of garnishment upon the defendant, the Goebel Brewing Company had in its possession, custody, or

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control goods and moneys, the property of the principal defendant, Louis J. Ouellette, which he is entitled to have applied upon his claim and judgment against the principal defendant, Louis J. Ouellette; *second*, that, at the time of the service of the writ of garnishment, the defendant the Goebel Brewing Company had in its possession property of the principal defendant, Louis J. Ouellette, which they held by conveyance or title that was void as to the creditors of the defendant. If the plaintiff shall have satisfied you, by a fair preponderance of evidence, of either of these two propositions, he is entitled to recover in this action.

"It is the law of this State that if any person garnished (and that applies to a corporation as well as an individual) shall have in his possession any property, goods, chattels, credits, moneys, or effects of the principal defendant which he holds by conveyance or title that is void as to the creditors of the principal defendant, or if any person garnished shall have received and disposed of such property of the principal defendant which is held by conveyance or title that is void as to the creditors of the defendant, he may be adjudged liable as garnishee on account of such property, and for the value thereof, although the principal defendant could not have maintained an action therefor against him."

Counsel cite 3 How. Stat. § 8059; *Heineman* v. *Schloss*, 83 Mich. 156; *Gumberg* v. *Treusch*, 103 Mich. 543.

The court did not give these requests in the language of the counsel, but he did charge as follows:

"It is claimed on the part of the plaintiff in this suit that this bill of sale was not a *bona fide* bill of sale; that is, that it was fraudulent, and therefore void. I charge you that, in order to make this bill of sale fraudulent or void in this case, it is necessary that it should be executed with an intent to hinder, delay, or defraud creditors. If it was executed for the purpose of securing *bona fide* indebtedness, it would not be fraudulent, no matter if it did in effect hinder or delay or defraud creditors; but if executed, not to secure a *bona fide* indebtedness, but for the purpose of hindering, delaying, and defrauding creditors, it would be void in law, and no title would pass under it by virtue of the bill of sale, if you should find it to be fraudulent,—that is, if it was not executed for the purpose of paying a *bona fide* indebtedness owed by Mr. Ouellette to the Goebel Brewing Company."

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It was the claim of the brewing company that it acted *bona fide;* that the bill of sale was made to secure payment of an actual indebtedness; that it was not fraudulent; and the jury found in favor of its claim. We think the court properly stated the rule of law, and fairly submitted the question of the *bona fides* of the transaction.

The other questions have been considered, but will not be discussed.

Judgment is affirmed.

The other Justices concurred.

GRIFFIN *v.* GRIFFIN.

EQUITY PRACTICE—DISMISSAL OF BILL—CROSS-BILL.

Where a cross-bill sets up additional facts relating to the subject-matter of the original bill, and asks affirmative relief upon them, the dismissal of the original bill will not carry with it the cross-bill.

Appeal from superior court of Grand Rapids; Burlingame, J. Submitted October 7, 1898. Decided November 1, 1898.

Bill by Michael F. Griffin against Thomas Griffin for a partnership accounting. Defendant filed a cross-bill, impleading Gertrude T. Griffin. From a decree for defendant upon the cross-bill, Gertrude T. Griffin appeals. Affirmed.

D. E. Corbitt (*Ray & Cordill*, of counsel), for appellant.

Wolcott & Ward, for defendant.

HOOKER, J. The bill in this cause alleged a partner-

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ship and prayed an accounting between Michael F. Griffin and the defendant, Thomas Griffin. The latter filed an answer, denying the partnership, and alleging that the transactions set forth in the bill created a trust in his favor, and that complainant's wife, Gertrude Griffin, was so connected therewith as to make her a necessary party, and she was brought in. Her demurrer to the cross-bill was before us in the case of *Griffin* v. *Griffin*, 112 Mich. 87, and was overruled. She afterwards answered, as the complainant had previously done. Upon the hearing the complainant voluntarily caused his bill to be dismissed, and defendant Gertrude Griffin claimed that the cross-bill should fall with it; but the trial court held otherwise, and proceeded to hear the case. A decree was rendered in favor of the complainant in the cross-bill, Thomas Griffin. Gertrude Griffin has appealed.

Most of the questions of law applicable to this case were disposed of upon the former hearing. The claim that the dismissal of the original bill carried with it the cross-bill cannot be sustained, as that rule does not apply to cases where the cross-bill sets up additional facts relating to the subject-matter of the original bill, and asks affirmative relief upon them. See *City of Detroit* v. *Detroit City R. Co.*, 55 Fed. 569; 5 Enc. Pl. & Prac. 663, and note. *McGuire* v. *Van Buren Circuit Judge*, 69 Mich. 593, impliedly recognizes this rule.

The testimony shows that M. F. Griffin was a lawyer, and that his brother, Thomas, came to reside with him, and engaged in business upon his own account, loaning money and dealing in real estate. Gertrude Griffin, the wife of M. F. Griffin, inherited some property, of which her husband appears to have had a general management as her agent, and the business affairs of the two brothers and Gertrude became involved. Finally, M. F. Griffin transferred the property that was in his name, or the most of it, to his wife, and she began an action in attachment against Thomas, and M. F. Griffin filed the original bill in this cause, alleging that he and Thomas were copartners.

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The circuit judge found that no partnership relation existed, and that Gertrude Griffin held property justly belonging to Thomas, and upon an accounting made a decree for a balance in favor of Thomas. The case involves a number of items and complicated transactions, which need not be discussed at length, as we think that the decree of the superior court was as favorable to the defendant Gertrude Griffin as she should expect, and the other parties have not appealed.

The decree will therefore be affirmed, with costs.

MONTGOMERY, MOORE, and LONG, JJ., concurred. GRANT, C. J., did not sit.

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s124 668

BELDEN *v.* BLACKMAN.

1. EQUITY PRACTICE—BILL TO ENFORCE JUDGMENT—DEMURRER—ATTORNEY AS COMPLAINANT—JUDICIAL NOTICE.
   The Supreme Court will not take judicial notice that the complainant in a bill to enforce a judgment is the same person as one bearing the same name who is an attorney of the court, upon a demurrer which sets up the statute (2 How. Stat. § 7185) prohibiting attorneys from purchasing claims for the purpose of instituting suit thereon.

2. SAME.
   Nor, conceding the identity of the parties, will the court assume, from the fact that the bill demurred to was filed three days after the purchase of the judgment by complainant, that the purchase was for the purpose prohibited by the statute.

3. SAME—STATEMENTS IN DEMURRER—CONCLUSIVENESS.
   While complainant is not bound by a statement of fact in a demurrer, defendant cannot complain if the court, in passing upon the demurrer, assumes it to be true.

4. LIMITATION OF ACTIONS—CAUSE ARISING WITHOUT STATE.
   The saving to the creditor, in the statute of limitations, of

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the time that the debtor is absent from the State, applies to causes of action which accrue without the State between nonresidents.

Appeal from superior court of Grand Rapids; Burlingame, J. Submitted October 7, 1898. Decided November 1, 1898.

Bill by William P. Belden against R. Amelia Blackman, executrix of the last will and testament of Ezekiel Jewett, deceased, and George W. Barker, a legatee, to restrain the payment of a legacy. From an order overruling a demurrer to the bill, defendant Blackman appeals. Affirmed.

McGarry & Belden, for complainant.

C. H. Gleason, for appellant.

MOORE, J. This is an appeal from an order overruling a demurrer to a bill in chancery.

The bill alleges, in substance, that complainant is the owner of a judgment rendered before a court of record in the State of New York in December, 1877, for upwards of $500, at the suit of one Watkins, against George W. Barker, and that said judgment is still in full force and effect, and of the present value of $1,200; that in August, 1897, it was assigned for a valuable consideration by Watkins to complainant. The bill further states that the defendant is executrix of the last will and testament of Ezekiel Jewett, deceased; that by the terms of the will said George W. Barker is entitled to a legacy of $500, and may be entitled to a larger sum, and, unless restrained by the order of the court, the executrix will pay over to Barker said sum of money. It is further stated that Barker is a resident of Arkansas, and has no property in the State of Michigan subject to garnishment or other process, and is and has been insolvent ever since the rendition of said judgment; that complainant will suffer irreparable

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injury unless the executrix is restrained from paying the legacy. The bill prays a receiver may be appointed to take charge of said legacy, and to pay the same to the satisfaction of the claim of complainant. It also contains a general prayer for relief. The bill is signed, "William P. Belden, Complainant. Walbridge & Belden, Solicitors for Complainant."

The reasons stated in the demurrer, so far as it is necessary to repeat them here, are as follows:

"1. Because it appears by the said bill of complaint that the said complainant is an attorney at law and solicitor in chancery and a counselor, and that he purchased the judgment referred to in said bill of complaint on the 28th day of August, 1897, with the intent and for the purpose of bringing suit thereon; and that this suit, based on said judgment, was begun by him in this court on the 31st day of August, 1897,—all of which is contrary to the provisions of the statutes of the State of Michigan, and especially contrary to the provisions of section 7185 of volume 2 of Howell's Annotated Statutes, being the statutes of the State of Michigan. * * *

"4. Because, if the said complainant and the said Ira W. Watkins, or either or both of them, ever had or obtained in any court of the State of New York a judgment against said defendant George W. Barker to the amount, including damages and costs, of $506.97, or in any other amount,—which this defendant doth in no sort admit,—the said judgment was obtained more than 19 years before the same was assigned to said complainant, and more than 19 years before the said bill of complaint was exhibited in this honorable court; and the said defendant does not now reside, and has never resided, in the State of Michigan, and has in no way recognized said judgment, or paid anything thereon, within said 19 years; and, if the said judgment ever had any binding force or effect, it is now wholly outlawed, illegal, and void, and cannot be made the basis of an action in any court in the State of Michigan."

As to the first of these reasons: It does not appear in the bill that complainant is an attorney at law and solicitor in chancery, but it is urged complainant is a solicitor of this court, and the court will take judicial notice of its

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own officers, including attorneys, and their signatures and official acts; citing *Norvell* v. *McHenry*, 1 Mich. 233; *Johnson* v. *Delbridge*, 35 Mich. 439. These authorities do not sustain the doctrine as broadly stated by counsel. There is nothing to show that the William P. Belden who is the complainant is the same William P. Belden who is an officer of this court. Nor is there anything to show that the purpose for which the judgment was assigned to him is the one prohibited by the statute.

As to the second reason stated: If it was necessary to state in the bill sufficient facts to prevent the statute of limitations from running against this claim, the statements contained in the demurrer supply that defect by showing the defendant does not now, and never has, resided in the State of Michigan. While the complainant is not bound by the statement of facts contained in the demurrer, the defendant cannot complain if the court assumes they are true. It is said by counsel the statute does not apply to a right of action which accrued without the State between parties who were at the time nonresidents, but applies only to actions that accrue within the State. The courts of New Jersey and Texas sustain the doctrine as contended. Our statute is like that of Massachusetts and New York. The statutes of those States have been construed as applying to causes of action which accrued without the State between nonresidents. *White* v. *Bailey*, 3 Mass. 270; *Wilson* v. *Appleton*, 17 Mass. 180; *Bulger* v. *Roche*, 11 Pick. 36 (22 Am. Dec. 359); *Carpenter* v. *Wells*, 21 Barb. 593; *Power* v. *Hathaway*, 43 Barb. 214; *Miller* v. *Brenham*, 68 N. Y. 83. We think the last-named cases should be followed here.

A bill of complaint similar to this was sustained in *Earle* v. *Kent Circuit Judge*, 92 Mich. 285.

The order is affirmed, with costs against defendant, as executrix, to be paid out of the fund belonging to Barker.

MONTGOMERY, HOOKER, and LONG, JJ., concurred. GRANT, C. J., did not sit.

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H. M. LOUD & SONS LUMBER CO. *v.* HAGAR.

1. TAXES—WARRANT—DIRECTION.
   A warrant for the collection of taxes is sufficient if directed to the township treasurer of a specified township and county, although it does not contain the treasurer's name.

2. SAME—ASSESSMENT IN WRONG NAME—LEVY AND SALE.
   Lands of H. M. L. & Sons Lumber Company, a corporation, were by mistake assessed to "H. M. L. & Sons," a copartnership. *Held*, that, under the curative provision of the tax law (Act No. 206, Pub. Acts 1893, § 99), the assessment was valid, and that a levy upon and sale of personal property of the lumber company to satisfy the tax was proper.

Error to Oscoda; Simpson, J. Submitted October 18, 1898. Decided November 1, 1898.

Replevin by the H. M. Loud & Sons Lumber Company against Henry D. Hagar. From a judgment for defendant, plaintiff brings error. Affirmed.

M. J. Connine, for appellant.

John A. McMahon, for appellee.

MOORE, J. Plaintiff replevied from defendant a wagon which he bought at a sale made by the township treasurer to collect a tax which the treasurer claimed the plaintiff should pay. The case was tried by a jury, who rendered a verdict in favor of defendant. The case is brought here by plaintiff, assigning a number of errors in the trial.

The tax was levied upon several descriptions of real estate, which the plaintiff claims it did not own, but that they were owned by one Vaughn. It claimed that it took the title to the land simply to secure it for advances made to Vaughn, which advances had been paid, and that it had no further interest in the land. Testimony was

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given in support of this claim. The supervisor, before making the assessment, examined the records in the office of the register of deeds, and found the title to be in the plaintiff. The record shows the land was deeded to the plaintiff July 8, 1889, by warranty deed, which was recorded July 22, 1889. There is nothing to show, except a parol agreement to convey, but that the title remained in the plaintiff when the assessment was made. The plaintiff did not appear before the board of review, and represent it was not the owner of the land, but, when an attempt was made to collect the tax, it did make the claim. The judge left it to the jury to say whether the plaintiff was the owner of the land or not, and instructed them, if the plaintiff was not the owner, they must return a verdict in its favor. The verdict shows the jury found the plaintiff was the owner.

The warrant to the tax roll was directed, "To ——, Township Treasurer of the Township of Big Creek, County of Oscoda." It was signed, "James B. Markle, Supervisor of the Township of Big Creek." Objection was made to this warrant because it did not contain the name of the treasurer as well as his official title. This objection is not well taken. The precise question was raised and decided in *First Nat. Bank* v. *Township of St. Joseph*, 46 Mich. 526.

The lands were assessed on the roll to "Loud, H. M., & Sons," instead of being assessed to the H. M. Loud & Sons Lumber Company. Plaintiff insists that, while this might be a good assessment as against the land, it would not authorize the treasurer to levy upon personal property belonging to anybody except Loud, H. M., & Sons, and that, as the plaintiff corporation is not the same entity as the partnership which was assessed, the treasurer was not authorized to levy and sell property belonging to the plaintiff. Section 99, Act No. 206, Pub. Acts 1893, provides for just such a contingency as has occurred here. As already stated, the jury found the property assessed belonged to the plaintiff. The property levied upon to

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satisfy the tax belonged to it. No injustice has been done plaintiff by levying upon property belonging to it to satisfy a tax upon its property. This question has been before this court in a number of cases, where it was decided against the contention of plaintiff. *Petrie Lumber Co.* v. *Collins*, 66 Mich. 64; *Michigan Dairy Co.* v. *McKinlay*, 70 Mich. 574; *Hill* v. *Graham*, 72 Mich. 659; *Fletcher* v. *Post*, 104 Mich. 424; *Hinds* v. *Township of Belvidere*, 107 Mich. 664.

These are the principal questions in the case. While the others have had attention, they will not be discussed.

Judgment is affirmed.

The other Justices concurred.

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ESCANABA BOOM CO. *v.* TWO RIVERS MANUFACTURING CO.

1. SETTLEMENT—CONSTRUCTION—RECOUPMENT.

   A written adjustment of accounts between a lumber company and a boom company, which leaves open, as "the sole question" for future determination, whether any price for the services of the boom company over and above the rate at which payment is made by the lumber company, up to the rate claimed by the boom company, is a "reasonable" price, the lumber company admitting its liability if the reasonableness of the demand shall be determined, precludes the latter company from afterwards asserting a claim of recoupment for damages occasioned by delay in the performance of the work.

2. RAFTING CHARGES—REASONABLENESS.

   The fact that delivery of logs by a boom company was delayed until the fall storms had rendered transportation dangerous has no bearing upon the reasonableness of its charges, since the cost of its services could be no less in such season, and the reasonableness of a charge for labor, where no claim is made that it was not well done, depends simply upon the cost of the work and a reasonable profit.

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Error to Delta; Stone, J. Submitted October 19, 1898. Decided November 1, 1898.

Assumpsit by the Escanaba Boom Company against the Two Rivers Manufacturing Company for work and labor. From a judgment for plaintiff, defendant brings error. Affirmed.

Plaintiff is a corporation organized under 1 How. Stat. chap. 114, and doing business on the Escanaba river. Defendant is a corporation engaged in lumbering on the same stream, from 1892 to 1896, inclusive. Plaintiff fixed a uniform price of 35 cents per thousand feet for booming, assorting, rafting, and delivery of logs. Defendant insisted that 20 cents was a reasonable charge, and up to 1896 had paid only that amount, leaving the price unsettled and their accounts undetermined. On May 13, 1896, the parties entered into an agreement, reciting their differences and the confusion in their accounts on account of such differences, and adjusting them on the basis of 20 cents per thousand, and defendant paying upon that basis. The agreement also stated the amount due each year on the basis of 35 cents, and provided that:

"The adjustment of said unpaid 15 cents per thousand feet is left for future settlement between the parties, the sole question between the parties, and to be determined, being whether or not any charge above said 20 cents per thousand feet for the work above specified is a reasonable price; and should it be finally determined, either between the parties, or by suit brought upon this contract by the party of the first part before any court of competent jurisdiction, or by arbitration, as shall hereafter be agreed upon between the parties, that any charge above 20 cents per thousand is a reasonable price, then the party of the second part agrees, upon demand, to pay said party of the first part such excess over and above said 20 cents per thousand, up to the amount of 35 cents per thousand feet.

"It is understood that failure of the party of the first part to render accounts for said unpaid 15 cents per thousand feet, and the giving of receipts in settlement of accounts in which the price of said work as is hereinbefore

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set forth is reckoned and allowed at the rate of 20 cents per thousand feet, shall not be considered as a waiver of the right of the party of the first part to demand and collect the excess over and above said 20 cents per thousand feet, up to the full amount of 35 cents per thousand feet, as claimed by the party of the first part, and to sue for the same upon the terms of this contract."

On November 28, 1896, another agreement was made, on account of an omission of the account for 1892. December 17, 1896, another agreement of settlement was made, reciting the first contract and being subject to it.

This suit was instituted in August, 1897, to recover the 15 cents per thousand. Defendant, with its plea of the general issue, gave notice of recoupment, on the ground that plaintiff should have delivered the logs before September 1st each year, because of the danger in towing logs over Lake Michigan after that time on account of rough weather. Defendant towed its logs in rafts to its mill at Two Rivers, Wis. Defendant claimed to have suffered damages on this account. The circuit court refused to admit any evidence of recoupment.

George Gallup, for appellant.

F. D. Mead (*R. C. Flannigan*, of counsel), for appellee.

GRANT, C. J. (*after stating the facts*). We think the ruling of the circuit judge was correct. The agreement settled all the differences between the parties except the price of the work, and left that as "the sole question" between them. The time for defendant to speak of any such claim was when the contract was made. If defendant desired to have its logs delivered earlier, it should have notified plaintiff.

It is suggested that testimony upon the subject of the recoupment was competent in determining the reasonableness of the charge. The cost of rafting, driving, and booming certainly could have been no less after September 1st than before. The reasonableness of the charge de-

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pended upon the cost of the work and a reasonable profit. No claim is made that the work was not well done, but only that it was not done within the time it ought to have been done.

Judgment affirmed.

MONTGOMERY, HOOKER, and MOORE, JJ., concurred. LONG, J., did not sit.

BOGERT v. JACKSON CIRCUIT JUDGE.[1]

1. MANDAMUS TO DISSOLVE INJUNCTION—WHEN LIES.
   An application for *mandamus* to compel the dissolution of an injunction will be entertained when questions of law only are involved.

2. INJUNCTIONS — PAVING ASSESSMENTS — INEQUALITY — CHARTER REMEDY.
   An injunction should not issue to restrain the paving of a street by a municipal corporation, where the only irregularity in the proceedings relates to inequalities in the assessment, which may be corrected without stopping the progress of the work, under a provision of the charter that, when any such assessment is invalid, the council may make a new assessment for the purpose for which the original assessment was made, whether or not the improvement has been completed or any part of the assessment has been paid.

3. SAME—FACTS NOT APPEARING IN BILL—CONCESSIONS.
   A concession as to the existence of facts not appearing in a bill for an injunction must be regarded as part of the bill.

Mandamus by James K. Bogert to compel Guy M. Chester, acting circuit judge of Jackson county, to dissolve an injunction restraining the paving of certain streets in the city of Jackson. Submitted November 1, 1898. Writ granted November 4, 1898.

[1] Rehearing denied January 20, 1899.

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Thomas E. Barkworth, for relator.

Parkinson & Campbell, for respondent.

MOORE, J. This is an application for a writ of *mandamus* requiring the dissolution of an injunction restraining the paving of certain streets in the city of Jackson. Ordinarily, we would not entertain such an application, but it appears from the case as presented that the questions involved are questions of law, and for that reason we entertain the application.

About August 1, 1898, Miar McLaughlin and other taxpayers filed a bill in chancery to restrain the city of Jackson from paving portions of two streets in that city. The city of Jackson and Mr. Bogert, who had made a contract with the city to do the paving, were made parties. An injunction was issued by the circuit judge, and upon his refusal to dissolve the injunction this application was made.

No fraud or intentional wrong is charged against any one, but it is claimed the necessary steps were not taken by the common council to authorize it to make this improvement, and to make the assessments against the property of the complainants which it made. The proposed paving would cost over $23,000, about $8,000 of which was to be borne by the city, and the balance by the property owners in a special assessment district. The steps taken by the city were as follows:

March 17, 1898, resolution passed, submitting to the electors proposition for a loan to pay for the improvement.

April 18th, resolution adopted, determining the necessity of the improvement, and directing estimates, plats, and diagrams of the special assessment district to be made and reported.

May 2d, resolution adopted, directing notice of hearing of objections to assessment district.

May 16th, resolution adopted, directing manner of assessment.

June 6th, resolution adopted, directing publication of notice of review of assessment.

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June 20th, the assessment rolls were confirmed by resolution.

July 1st, resolution adopted, directing the contract to be made with Mr. Bogert.

The electors authorized the loan; the proper notices were published; the contract was properly let. It is evident from the record that the council attempted to comply with the provisions of the charter. Complainants did not appear before the board of review. The bill of complainants was filed August 1st. When it was filed it was supposed by the complainants the records did not show that any of the above-mentioned resolutions were adopted by a yea and nay vote, as required by the charter. A further examination of the records of the common council disclosed they were adopted by a yea and nay vote, as required by the charter. The defects in the proceedings which the complainants supposed existed, because the resolutions were not adopted as required, need not be discussed, because they did not exist.

It is urged the common council did not properly submit the matter of the loan to the electors. We think they substantially followed the charter provisions, and that the only irregularities, if there are any, shown by the bill, relate to the inequalities of the assessment. Section 22 of chapter 20 of the charter (Act No. 414, Local Acts 1889) provides:

"Whenever any special assessments, heretofore or hereafter made, shall, in the opinion of the council, be invalid by reason of irregularity or informality in the proceedings, or if any court of competent jurisdiction shall adjudge such assessment to be illegal, the council shall, whether the improvement has been made or not, or whether any part of the assessment has been paid or not, have power to cause a new assessment to be made for the same purpose for which the former assessment was made. All the proceedings on such re-assessment, and for the collection thereof, shall be conducted in the same manner as herein provided for the original assessment; and whenever any sum, or any part thereof, levied upon any premises in the assessment so set aside, has been paid and not refunded, the payment so made shall be applied upon the re-assess-

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ment on said premises, and the re-assessment shall to that extent be deemed satisfied."

If any injustice has been done the complainants in the matter of their assessment, it is not necessary to stop all of the improvement, and to delay the city in a proper attempt to improve the streets, or to enjoin the contractor, who in good faith has assembled the necessary material and machinery, from completing his contract. It is entirely competent, under the provisions of the charter, to correct any injustice, if any has been done, without delaying the work. *Townsend* v. *City of Manistee*, 88 Mich. 408.

If the concession made in relation to the adoption of the various resolutions by a yea and nay vote had appeared in the bill, it would not have stated such a case as, under the law, would authorize the issuing of a writ of injunction. This concession having been made, it must be regarded as part of the bill.

The writ will issue as prayed.

The other Justices concurred.

BARNETT *v.* SALOMAN.

1. DEBTOR AND CREDITOR — UNAUTHORIZED PAYMENT — RATIFICATION — QUESTION FOR JURY.

   A creditor's statement to his debtor, after the latter has made an unauthorized payment of the debt to a third person, that the debt is discharged and the evidence of the same destroyed, does not necessarily show a ratification, its weight being for the jury.

2. TRIAL — DELIBERATIONS OF JURY — IRREGULAR INSTRUCTIONS — FAILURE TO OBJECT — NEW TRIAL.

   After the jury had retired, they summoned the clerk, in the absence of the trial judge, and gave him a note requesting

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further instructions. The request was communicated by telephone to the judge, who, in reply, dictated to the clerk an instruction which properly covered the subject of the inquiry. This instruction, after being reduced to writing and submitted to counsel, was delivered by the clerk to the jury. *Held*, that counsel could not for the first time object to the proceeding on motion for a new trial.

Error to Wayne; Donovan, J. Submitted October 6, 1898. Decided November 9, 1898.

Assumpsit by Louis Barnett against Rosa Saloman on a promissory note. From a judgment for plaintiff, defendant brings error. Affirmed.

Selling & Hatch, for appellant.

Sloman & Groesbeck (*Benjamin Jacobson*, of counsel), for appellee.

LONG, J. Action upon a promissory note of $100, dated September 1, 1894. The execution of the note is admitted. The defense is that it has been paid.

The plaintiff is 75 years of age, and the defendant is his niece. They live in the same house, plaintiff living in the upper part of it. It appears that, after the making of the note, plaintiff was sued for a breach of promise of marriage. This case was settled by plaintiff, and on his return home after such settlement, he says, he stated to defendant that she could have this $100 note which she owed him; that defendant and her husband declined to receive it, saying that they had no children, and did not need the money. Defendant admits this conversation, but claims that she then told the plaintiff to give the money due on the note to Louis Saloman, her husband's brother, who was then out of employment, had four children, and needed the money, as he wanted to start in business; that the plaintiff promised that he should have the money; that this conversation was in the presence of her husband. The husband of defendant also testified to this conversation, and, further,

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that the plaintiff told him to pay the money on the note to Louis Saloman; that, acting upon this, he did pay the $100 to Louis Saloman; that he informed the plaintiff of such payment, and asked to have the note back, and was informed by the plaintiff that the note had been destroyed. This whole arrangement as testified to by defendant and her husband is denied by plaintiff. He testified that there was a talk about his letting Louis Saloman have some money, and that he said if he got back the $100 he would loan Louis $50; but that he never authorized the defendant or her husband to pay Louis the money due on the note, and never approved such action; that, after defendant refused to receive it as a gift, he kept the note, and produced it on the trial.

The court charged the jury, at the request of defendant, as follows:

"If you find from the evidence that the plaintiff, after the termination of the breach of promise case with Rosa Schlessinger, authorized the defendant or her husband, Jacob Saloman, to pay the amount of the note sued on in this case to Louis Saloman, and that the plaintiff thereafter never revoked the authority, and that the defendant or her husband paid the amount of the said note to the said Louis Saloman, then your verdict would be for the defendant; that is, of course, if the note is paid you would not find a verdict on it.

"If you find that the plaintiff in January, 1896, authorized Louis Saloman to collect the amount of this note from the defendant in this case, and that in pursuance of that authority the said defendant or her husband did so pay the $100 to the said Louis Saloman, then your verdict would be for the defendant. * * *

"If you find after the $100 was paid— I will say, if you find that the $100 was paid to Louis Saloman; that the plaintiff was informed by the defendant or her husband, and approved of the action so taken,—then your verdict would be for the defendant. It is immaterial in this case what Louis Saloman was to do with the money. If you find that the plaintiff authorized the defendant or her husband to pay Louis Saloman the money, and his ratification of the payment thereafter, if he did so ratify it, would show that he did not intend that the money was to be applied for any particular purpose.

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"It is undisputed in this case that Rosa Saloman had authorized her husband, Jacob Saloman, to act in the matter for her; and if you find that Jacob Saloman was instructed by the plaintiff in this action to pay the amount of the note to Louis Saloman, and that Jacob Saloman did so pay it, then the payment was the same as if made to the plaintiff himself, and then the verdict would be for the defendant.

"If you find that the plaintiff authorized payment of the money due on this note to Louis Saloman, and it was paid, then the fact that the note was not canceled or destroyed is immaterial in this case."

Defendant's counsel also asked the court to charge the jury:

"If you find that, after the payment of the amount of the note to Louis Saloman, Jacob Saloman asked the plaintiff for the note, so that it might be canceled or destroyed, and that the said plaintiff informed the said Jacob Saloman that the note was destroyed and that he would never again try to enforce payment, your verdict must be for the defendant."

The following request was also made by the defendant:

"If you find that the plaintiff in this suit, one month before he brought suit upon this note, stated to the defendant, in the presence of her husband and in the presence of Mrs. Roth, that the defendant in this suit owed him nothing, and if he did not in any way qualify this statement, this is conclusive proof that he considered the note paid, and your verdict must be for the defendant."

These requests were refused, and counsel for defendant insist that the refusal to give them was prejudicial to the defendant, and that the requests correctly stated the law governing the case. We think the court properly refused them. If it be assumed that the plaintiff made these statements, he would not be estopped from making claim on the note. He denied positively that he made any such statements, and the whole controversy was for the jury. The court very fully and fairly stated to the jury that, if the plaintiff instructed defendant's husband to pay the money to Louis Saloman, he could not recover. That was the only question in the case.

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It appears that a motion for a new trial was made upon the grounds that after the jury had been charged by the court, and had retired to their room for deliberation, the clerk of the court, in the absence of the court, and without consent of counsel for defendant, entered the jury-room, and received from the jury a note reading, "It is maintained by some of the jurors that the judge charged us that, if we believed that Jacob paid the money to Louis, we must bring in a verdict for the defendant;" that the clerk communicated the contents of this paper to the trial judge through the telephone; that the judge directed him to change the paper so that it would read, "If Jacob paid the money to Louis by authority of Barnett, the plaintiff, you must bring in a verdict for the defendant;" that defendant's counsel objected to this method of charging the jury, but that the clerk took the paper into the jury-room, defendant's counsel not being admitted, and no stenographer being present; and that the clerk was heard to say something to the jury, but what it was could not be heard. The motion was supported by the affidavit of counsel for defendant.

The plaintiff on such motion filed the affidavit of the clerk of the court in opposition to the motion, in which the clerk testified that, while the jury were in their room, he was informed by the officer in charge that the foreman of the jury requested to have him called; that he did not enter the jury-room, but went to the door; that the foreman stated that the jury desired to ask a question of the court; that he communicated this to the judge, who directed that the jury should put the question in writing, which was done, and the question was presented as stated in the motion; that one of the circuit judges was in the room adjoining while these matters were taking place; that, as soon as he received the question from the jury, he showed it to the circuit judge then present, who instructed him to submit it to the attorneys for both parties, which he did; that he then communicated it to the trial judge, who directed the change as above suggested;

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that he at once submitted the instruction to both the attorneys of the parties, neither of whom made any objection to its being handed to the jury; that he handed it to the jury, but in no manner otherwise communicated with them.

The motion was denied by the trial court, and error is assigned upon such denial. The whole matter was before the trial court, who was in a better position to determine the truth of the facts stated in the affidavits on this motion than we are. If counsel for the defendant consented that the further charge might be handed to the jury by the clerk, or stood by and made no objection to such proceeding, we think no error was committed of which counsel can now complain. It is true that no communication must be made to the jury after they have retired to deliberate upon their verdict, except by order of the court. The court itself directed that this further instruction be given them in writing. Counsel for defendant, if the clerk's affidavit be true, knew that they were to be so further instructed, and made no objection. The instruction was a correct statement of the law applicable to the case, and we think no new trial should be now granted at the instance of counsel who made no objection at the time.

The judgment must be affirmed.

The other Justices concurred.

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LINDLEY *v.* LUPTON.

MORTGAGES—SETTLEMENT WITH AGENT.

A bill to foreclose a mortgage cannot be maintained, where the authorized agent of the mortgagee delivered to the mortgagor, for a valuable consideration, the notes secured by the mortgage, with the understanding that a settlement of the mortgage was fully consummated, leaving nothing to be done but the delivery of the discharge of the mortgage, although the mortgagee thereafter attempted to repudiate the settlement.

Appeal from Ogemaw; Sharpe, J. Submitted October 6, 1898. Decided November 9, 1898.

Bill by Robert T. Lindley against Levi R. Lupton and others to foreclose a mortgage. From a decree dismissing the bill, complainant appeals. Affirmed.

F. L. Snodgrass, for complainant.

Ross & Harris (*W. A. Weeks*, of counsel), for defendants.

LONG, J. In February, 1895, the defendants made and delivered to complainant their promissory note for $600, due in two years from date. The payment of this note was secured by mortgage executed by the defendants upon the S. E. ¼ of S. E. ¼ of section 26, township 24 N., of range 3 E., and lots 1, 9, and 10, in block 9, of the village of Lupton, all in Ogemaw county, this State. Two other small loans were thereafter negotiated between the parties, and secured by mortgage. The complainant lives in Elizabethtown, Ind. This proceeding is brought to foreclose the $600 mortgage. The defense interposed is a claimed settlement and payment of the mortgages by deed of certain property in Ogemaw county, executed by de-

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fendants to complainant, and such deed accepted by the complainant by Mr. Snodgrass, his agent in this State, and a further payment of $100 in a draft. The court below found in favor of defendants' theory, that a settlement had been made, and dismissed the complainant's bill. Complainant appeals.

It appears that considerable correspondence passed between the parties in reference to a settlement of complainant's claims, and on May 4, 1897, defendants wrote complainant, offering to deed him the S. E. ¼ of the S. E. ¼ of section 26, the village residence property, and pay $100 in cash, by way of settlement. On June 7th following, complainant wrote defendants that, if they would deed the house and lots in Lupton, the 40 acres of land, and pay $100 in cash, he would accept it. In answer to this the defendants wrote on June 8th, saying:

"Our proposition is exactly the same as yours, unless you mean to include the Laura Lupton lots in the village you hold security on for interest due last year. We did not mean to include them in our proposition. Please let us know if you did. * * * On reading your letter, I recalled the deeds out of the mail before they left town. I will deliver them and the money over to Mr. Snodgrass, or to M. H. French & Co. bank at West Branch, whichever you designate, in exchange for the notes and mortgage releases. Let me know which place you send them, and oblige."

It is the claim of defendants that, shortly after this letter, they received a card from the complainant, saying:

"I have asked Mr. Snodgrass to talk over your proposition to me with you. If you can trade with him, you can count the matter as satisfactorily settled with me. Hoping the matter will be amicably settled, I am," etc.

The time of receiving this card is in dispute between the parties, but we are satisfied that it was received after sending the above letter to the complainant.

It is further claimed by the defendants that, upon the receipt of this card, they arranged the matter with Mr. Snodgrass; that they made and delivered the deeds of

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property as requested, and that, upon such settlement, Mr. Snodgrass turned over all the notes accompanying the mortgages to them, and among which was the note accompanying the mortgage in controversy here; that, at the time the notes were so surrendered, Mr. Snodgrass, acting as agent and attorney for the complainant, agreed to procure the releases of the mortgages, and deliver them to defendants; and that, as a part of the consideration of the terms of settlement, they delivered to Mr. Snodgrass a draft for $100, payable to complainant. The complainant thereafter attempted to repudiate the settlement, and demanded the return of all the papers as they were originally. This defendants refused to comply with, and complainant commenced these proceedings for a foreclosure of the mortgage. There is no question upon this record but that these notes were delivered to the defendants by Mr. Snodgrass as the agent of complainant; and we think it is shown by a great preponderance of evidence that they were surrendered with the understanding that the settlement was fully consummated. Nothing was left to be done but the delivery of the discharges of the mortgages.

The decree of the court below must be affirmed.

MONTGOMERY, HOOKER, and MOORE, JJ., concurred. GRANT, C. J., did not sit.

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O'LEARY *v.* SCHOOL DISTRICT NO. 4 OF BRIDGEPORT TOWNSHIP.

SCHOOLS—TEACHER'S CONTRACT—EXPIRATION OF CERTIFICATE.

A school board's contract with a teacher to employ her for the fall term, and to give her a contract for five months longer if she gives satisfaction, will not bind the district to re-employ the teacher, though her fall's work prove satisfactory, if her certificate, without which under the school law no one is authorized to teach, has less than five months to run.

Error to Saginaw; Snow, J. Submitted October 6, 1898. Decided November 9, 1898.

Assumpsit by Hannah O'Leary against school district No. 4 of Bridgeport township, upon a teacher's contract. From a judgment for plaintiff, defendant brings error. Reversed.

Harris & Kendrick, for appellant.

Fred H. Allen, for appellee.

LONG, J. Plaintiff entered into a written contract with the defendant to teach the school of the district. The contract is as follows:

"It is hereby agreed by and between school district No. 4 in the township of Bridgeport, county of Saginaw, State of Michigan, and Miss Hannah O'Leary, a legally qualified teacher, that said teacher is to teach, govern, and conduct the pupils of the public school of said district to the best of her ability; keep a register of the daily attendance and studies of each pupil belonging to the school, and such other records as the district board may require; make the report required by law; and endeavor to preserve in good condition and order the school-house, grounds, furniture, apparatus, and such other district property as may come under the immediate supervision of said teacher,—for a term of three school months, com-

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mencing on the 21st day of September, A. D. 1896, for the sum of twenty-six dollars per school month, to be paid at the end of each month; and the said school district hereby agrees to give her a contract for the remaining five months of the school year if she gives satisfaction; and the said school district hereby agrees to keep the school-house in repair, to provide the necessary fuel and school register, and for the services of said teacher as prescribed above, well and duly performed, to pay said teacher the sum of twenty-six dollars per school month, at the end of each month, during a term of three months, commencing on the 21st day of September, 1896: *Provided*, that in case said teacher shall be legally dismissed from school, or shall have her certificate legally annulled by expiration or otherwise, then said teacher shall not be entitled to compensation from and after such dismissal or annullment: *Provided, further*, that the wages of said teacher for the last month of the school term shall not be paid unless said teacher shall have made the report for the school term as required by law."

At the time this contract was made, plaintiff held a third-grade certificate from the board of school examiners, which expired on March 28, 1897. She taught the school for the three months commencing September 21, 1896. At the end of that time the board hired another teacher, and advised plaintiff that her services were no longer required. This action was brought to recover what the plaintiff claims is her due under the contract. On the trial the court directed the jury that the contract was for eight months, and, if the board acted in bad faith in discharging her, she might recover for such part of the additional five months as would terminate on March 28, 1897, her certificate expiring at that time, and that she could not recover for services after that time. The jury found a verdict in her favor, and defendant brings error.

The court was in error in construing the contract as one for eight months. The most that can be said of it is that it was a contract for three months, with an agreement that at the end of that time the board would "give her a contract for the remaining five months of the school year if she gives satisfaction." At the end of the three months

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she was not a legally qualified teacher for the full five months thereafter, as her certificate extended only about three months thereafter. The school law provides that:

"No person shall be considered a qualified teacher within the meaning of this act, nor shall any school officer employ or contract with any person to teach in any of the public schools under the provisions of this act, who has not a certificate in force, granted by the board of school examiners or other lawful authority." Act No. 147, Pub. Acts 1891, § 5, as amended by Act No. 34, Pub. Acts 1893, and Act No. 66, Pub. Acts 1895.

It appeared upon the trial that the board refused to enter into the five-months contract for the reason that the plaintiff had no certificate to teach that length of time. It is therefore evident that she was in no position to compel such action, and the court was in error in leaving the question of the motive of the board in discharging plaintiff to the jury. She had no contract for the five months, and was in no position to make one for that length of time. When the court directed the jury that she might recover for that part of the five months ending March 28, 1897, he was making a new contract between the parties; that is, a contract for three months instead of five. There was nothing in the case which warranted this. If the board was bound at all, it was to enter into a contract for five months. The plaintiff could not make such a contract, as she did not possess the necessary qualification therefor. The board was therefore released from any obligations under this contract, even though it could have been enforced if the plaintiff had been qualified to make it,—a point which it is not necessary to determine here.

The judgment below must be set aside. No new trial will be awarded.

The other Justices concurred.

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PIERPONT *v.* OSMUN.

TAX SALES—REDEMPTION—NOTICE—STATUTES.

Act No. 229, Pub. Acts 1897, which amended the general tax law by providing that no writ of assistance for the possession of land, "the title to which has been obtained under and in pursuance of any tax sale hereafter made," shall be issued until six months after the filing of proof of service upon the grantee in the last recorded deed, and the mortgagee in the last recorded mortgage, of notice of the right to redeem therein provided for, does not apply to previous purchases at tax sales upon which deeds had not been issued by the auditor general at the time the act took effect.

Appeal from Shiawassee; Smith, J. Submitted October 6, 1898. Decided November 9, 1898.

Petition by Warren Pierpont against William H. Osmun, Sr., for a writ of assistance. From an order granting the writ, defendant appeals. Affirmed.

Kilpatrick & Pierpont (*James H. McFarlan, amicus curiæ*), for petitioner.

J. Ten Eyck (*Alfred Russell*, of counsel), for defendant.

MONTGOMERY, J. The petitioner, Warren Pierpont, purchased certain lands at the annual tax sale held at the treasurer's office of Shiawassee county on the 7th day of December, 1896. The lands were sold for the delinquent taxes of 1894 under a decree the regularity of which is not questioned. A certificate of purchase was issued to the petitioner in the usual form. The lands not having been redeemed, the certificate of purchase was surrendered to the auditor general, and a deed was issued by the auditor general to the petitioner, which deed was dated February 14, 1898. After demand for possession of

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the premises in question, the petition in the present proceeding was filed asking for a writ of assistance. The defendant showed that he had tendered to the petitioner the full amount paid by him, together with the additional charges provided by Act No. 229 of the Public Acts of 1897. The circuit court granted the writ, and defendant appeals.

The two questions presented are whether Act No. 229, Pub. Acts 1897, was intended to affect the title or remedy of the petitioner and those occupying a like position, and, second, if this was the intention, whether the provision extending the time for redemption, and modifying conditions under which redemption may take place, impairs the obligation of contracts, and is, for that reason, unconstitutional. Both questions are discussed in the briefs of counsel. The provisions of the statute in question material to this inquiry are as follows:

"SEC. 140. No writ of assistance or other process for the possession of any land *the title to which has been obtained under and in pursuance of any tax sale hereafter made, or of any sale of State tax lands or State bids hereafter made*, except where such title shall be obtained under the provisions of section 131 of this act, shall be issued, until six months after there shall have been filed with the county clerk of the county where the land is situated a return by the sheriff of said county, showing that he has made personal service, or until substituted service, as hereinafter provided, has been made, upon the grantee or grantees under the last recorded deed to said land, and upon the mortgagee or mortgagees named in the last recorded mortgage, or any assignee thereof of record, of a notice," etc.

It is the contention of the appellant that this statute should be so construed as to include all titles so acquired after the act takes effect, and that the title is not acquired until the conveyance is actually made by the auditor general. It is said that the words "sale hereafter made" mean the same thing as "title hereafter acquired." We do not find ourselves able to agree with the learned counsel

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for the appellant. It appears by this section that the writ of assistance, authorized by other provisions of the tax law, is by the legislature denied in three cases: (1) In cases where the title to the land has been obtained under and in pursuance of a tax sale hereafter made; (2) in cases where the title is obtained by purchase of State tax lands; (3) in cases where the title is obtained by purchase of State tax bids,—in either of the two latter cases the purchase being made after the act takes effect. It was obviously not the intention of the legislature to deny the remedy to those who had made previous purchase of land at a tax sale, but who had not acquired their title or conveyance from the auditor general. To place this construction upon the statute, we would be required to insert the word "heretofore" in place of or in addition to the word "hereafter." It cannot be said that in this statute the words "any tax sale hereafter made" refer to the conveyance by the auditor general to the purchaser. These words in the tax law are used to denote the sale made on petition of the auditor general, and at which the certificate of purchase is given to the purchaser. Act No. 206, Pub. Acts 1893, §§ 70–72, 74. Section 70 provides for the sale; section 71 provides for the giving of the certificate at such sale; and section 74 provides that any person owning any of the lands, or any interest therein, may, at any time within one year from and after "such sale," redeem any parcel of such lands, etc. But the language of the act of 1897 is not ambiguous. It refers to a title which has been obtained in pursuance of a tax sale. The very language imports a distinction between a tax sale and an acquisition of title. Had the intent been otherwise, an apt term would have been, "a title obtained by one through a tax sale." But the language employed imports that a tax sale must have preceded the acquisition of title.

Being satisfied that the construction of the statute contended for by defendant cannot be adopted, it becomes unnecessary to consider whether the legislature has the power to enact such a provision as would relieve the

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owner of the property by materially extending the period of redemption.

The order appealed from will be affirmed.

The other Justices concurred.

HUNTON v. HERTZ & HOSBACH CO.

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WITNESSES—PRODUCTION OF DOCUMENTS.

The court may, where written documents are in court, order their production and admission in evidence, if found to be material, although no *subpœna duces tecum* has been issued.

Error to Wayne; Frazer, J. Submitted October 18, 1898. Decided November 9, 1898.

Assumpsit by Albert K. Hunton, administrator of the estate of Wilson H. Tousey, deceased, against the Hertz & Hosbach Company, for goods sold and delivered. From a judgment for plaintiff, defendant brings error. Reversed.

Plaintiff brought suit to recover the value of two car loads of birch lumber sold by the deceased to the defendant. The first sale was made through Mr. Tousey's agents, commission merchants in Detroit; Mr. Tousey living in Bay City. This load was unsatisfactory, and Morris R. Tousey, the son of the deceased, went to Detroit and saw the defendant. It seems to have been conceded that that load was not up to the representations. It is claimed that the difficulty about that car load was settled in the order for a second car load. On the receipt of the second car load, defendant objected to accepting it, claiming that the lumber was not as represented. Plaintiff had verdict and judgment.

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Trevor & Trevor (*C. E. Warner*, of counsel), for appellant.

T. A. E. & J. C. Weadock, for appellee.

GRANT, C. J. (*after stating the facts*). The case appears to have been submitted by counsel, and in the instruction of the court, upon the theory that the authority conferred upon the commission men by the deceased was material. This authority was contained in letters which passed between the deceased and the commission men. Mr. Morris R. Tousey was a witness for the plaintiff, and upon cross-examination was asked to produce the correspondence. The witness admitted the letters were in court, and in the possession of his counsel. His counsel stated that they were ready to produce them, if so ordered, but denied that they were material. The court declined to order their production, on the ground that it had not the power; that the proper course for the defendant was to issue a *subpœna duces tecum*. The court was in error. When written documents are in court, it is in the power of the court to order their production for examination, and for admission in evidence if found to be material. The only purpose of the *subpœna duces tecum* is that the documents may be produced in court. When they are in court, in the hands of the parties or their counsel, the court should order their production. *Powers* v. *Russell*, 26 Mich. 179.

Judgment reversed, and new trial ordered.

The other Justices concurred.

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WILLIAMS v. WILLIAMS.

1. DEEDS—DECLARATION OF TRUST.
   A declaration of trust, comprised in a separate instrument accompanying a deed, will, as between the parties, be given the same effect as if embodied in the deed itself.

2. SAME—HUSBAND AND WIFE—PURCHASER FOR VALUE.
   A wife, having voluntarily given to her husband a sum of money, was told by him that whatever property he had should be hers at his death. A few days before his death, the husband, pursuant to the agreement, deeded his entire property to the wife. *Held*, that she could not hold the property, as a *bona fide* purchaser, as against one who had conveyed it to the husband in trust.

3. SAME—TRUSTS.
   A trust in land reattaches, where the land, after being conveyed by the trustee to a *bona fide* purchaser, is subsequently redeeded to the trustee.

4. SAME—LANDLORD AND TENANT—ACCOUNTING FOR RENT.
   Where lands occupied by a tenant are conveyed by the landlord to his wife a few days before his death, the tenant's liability to account for rent in arrears at the time of the transfer is to the estate of the landlord, and not to the wife.

Appeal from Wayne; Hosmer, J. Submitted October 19, 1898. Decided November 9, 1898.

Bill by Louis H. Williams against Julia Williams and others to set aside a deed. From a decree for complainant, defendant Julia Williams appeals. Affirmed.

On October 17, 1884, complainant and defendant Julia Williams, being the owners as tenants in common of the land here in controversy, executed a warranty deed to one Melhose. At the same time Melhose executed a conveyance of the same land to Henry Williams, the husband of the defendant Julia. The purpose of these conveyances

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was to transfer the title to Henry Williams. At the same time Henry Williams, who was complainant's father, executed to him a declaration in writing, the substantial parts of which are as follows:

"Know all men by these presents, that I, Henry Williams, of the city of Wyandotte, county of Wayne, and State of Michigan, being desirous of holding real estate in my own name for the purpose of giving me a standing in the commercial world, do hereby agree with my son, Louis H. Williams, as follows: For and in consideration of the deeding to me by my said son (for the purpose above mentioned) his one-half interest in the following described property, to wit: 'The north one-half of lot eight (8), block seventy-two (72), situated on Biddle avenue, in the city of Wyandotte, in said county and State, together with the one-story brick store being on said ground; to have and to hold the same for and during my natural life,'—I hereby agree to pay all taxes and assessments, ordinary and extraordinary, that may be levied against the said property; to keep the building in as good repair as the same now is; to keep the buildings erected and to be erected fully insured against loss by fire; and, unless the said premises are reconveyed back to my son, Louis H. Williams, during my lifetime, I hereby agree to execute a will leaving the said property to the said Louis H. Williams, as the same is received by me without consideration, and only for the purposes above named."

Mr. Henry Williams died August 16, 1894. A few days before his death he executed a deed of the entire premises to his wife. The purpose of this suit is to set aside that deed as contrary to the agreement between complainant and his father, as evidenced by the writing.

Complainant, from the time of the execution of the deed to his father's death, occupied one room in the building as a store. No charge was ever made for the rent, and there is no evidence to show that the relation of landlord and tenant was ever understood to exist between complainant and his father. Defendant Julia claims to be a *bona fide* purchaser, without knowledge of the agreement between her husband and complainant. Her father gave her at one time $500, which she gave to her husband,

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and she claims to have given it to him upon the understanding that at his death whatever property he had should be hers. It is claimed that the deed to her was made pursuant to that agreement. The circumstances under which she gave this money to her husband appear in her own testimony, as follows:

"*Q.* You gave Mr. Williams some money in 1892, you say; $500. Just tell us what occurred at that time when you gave him the money. I want to know exactly what was said at that time between your husband and yourself.

"*A.* My husband said: 'That is all right, my dear. Whatever is going to be left will be yours, because you did everything to help me.'

"*Q.* And you had got this money from your father as an advancement on your portion of his estate?

"*A.* Yes, sir.

"*Q.* You took that money over, and you handed it to Mr. Williams?

"*A.* Yes, sir.

"*Q.* He didn't ask you for it?

"*A.* No, sir.

"*Q.* You simply walked over, and voluntarily gave it to him?

"*A.* Yes, sir.

"*Q.* And how long was it, after you gave him this money, that he told you it was going to be 'all right, my dear?'

"*A.* Just at the time I gave it.

"*Q.* He didn't ask you for a loan, or anything of that kind?

"*A.* No, sir.

"*Q.* Mr. Williams and yourself—Whatever money you had you gave over to him, and he used it, and if you wanted any money you used it?

"*A.* Yes, sir.

"*Q.* The same as husband and wife ordinarily do business together?

"*A.* Yes, sir.

"*Q.* And that is the way you came to give him this money, isn't it,—this $500?

"*A.* Yes, sir."

Defendant Julia had paid a mortgage upon the land, and had also purchased a few inches of an adjoining lot, upon which a portion of the building rested.

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The case was heard upon pleadings and proofs taken in open court. Decree was entered for the complainant, but provided that he should pay defendant Julia one-half of the amount paid by her to redeem the mortgage and to purchase the small strip of land, less one-half the rents of the property since the death of Mr. Williams.

Flowers, May & Moloney, for complainant.

James H. Pound, for appellant.

GRANT, C. J. (*after stating the facts*). 1. By the deed and the declaration accompanying it, Henry Williams had only a life estate in the land, and at his death the title revested in complainant. Had the declaration been incorporated in the deed, no question would arise as to its effect. As between the parties, the same effect must be given to the words when found in the declaration as when found in the deed. Only creditors of Henry Williams, and purchasers in good faith and for a valuable consideration, have rights in the property superior to those of the grantor and grantee.

2. Mrs. Williams was not a purchaser for a valuable consideration. She did not loan this money to her husband with any express agreement that these premises were to be conveyed to her in consideration for the loan. The money transaction was such as is common between husband and wife.

3. It is urged that this deed was made to defraud the creditors of complainant and defendant Julia, who were copartners in business at the time, and that, therefore, equity will not interfere. We find no tangible evidence to sustain this theory.

4. Mr. Henry Williams and his wife at one time executed a deed to one Archibald Campau. Mr. Campau subsequently redeeded the land to Mr. Williams. Defendant's counsel urges that there is nothing upon this record to show that Mr. Campau was not a *bona fide* purchaser, and, the presumption being that he is one, that Mrs.

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Williams is entitled to the same protection that would be given to Mr. Campau if a *bona fide* purchaser. This might be true if Mr. Campau had made the deed direct to her; but where property is conveyed by a trustee to a *bona fide* purchaser, and the title to the property is reconveyed to the trustee, the trust reattaches. 2 Perry, Trusts, § 830.

5. It is urged that defendant Julia is, in any event, entitled to an accounting for the rent of that part of the building occupied by complainant during her husband's lifetime. As already said, there is nothing in the record to indicate the existence of the relation of landlord and tenant, except the mere fact that the title was in the father, and a portion of the building occupied by the son. Whatever presumption might arise under the circumstances of this case, we need not consider. If complainant was bound to account to any one for the rents, it would not be to Mrs. Williams, but to the estate of Henry Williams.

Decree affirmed, with costs.

MONTGOMERY, HOOKER and MOORE, JJ., concurred. LONG, J., did not sit.

KEEGAN v. LORANGER.

FRAUDULENT CONVEYANCES — BILL IN AID OF EXECUTION—PRIMA FACIE CASE—HUSBAND AND WIFE.

The *prima facie* case which is established under Act No. 99, Pub. Acts 1897, on a bill in aid of execution, by introduction of the judgment, execution, and levy, and proof of the conveyance complained of, may be overcome by convincing testimony that the grant was in fulfillment of an agreement to make the deed in payment of a *bona fide* loan, although the grantee is the debtor's wife.

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Appeal from Monroe; Kinne, J. Submitted October 19, 1898. Decided November 9, 1898.

Bill in aid of execution by Thomas Keegan against Philip B. Loranger and Minnie S. Loranger. From a decree dismissing the bill, complainant appeals. Affirmed.

Charles A. Golden and *Willis Baldwin*, for complainant.

E. R. Gilday (*G. M. Landon*, of counsel), for defendants.

MOORE, J. This is an appeal from a decree dismissing a bill of complaint filed by a judgment creditor of Philip B. Loranger in aid of an execution.

In March, 1883, the complainant deposited money in the bank of Lafountain & Loranger. The partners composing this bank were Mr. Lafountain and the defendant Philip B. Loranger. Mr. Loranger shortly after this retired from the firm. In July, 1883, the bank failed, and passed into the hands of an assignee. Complainant received a portion of the amount due him from the assets of the bank. In September, 1885, he obtained a judgment for the balance due him, which judgment was sued over and put into a new judgment in November, 1895. The father of Philip B. Loranger died in 1872, leaving quite an estate. His will left the property to his wife as trustee. Upon her death, a portion of the property would, by the terms of the will, become the property of Philip B. Loranger. In October, 1895, Philip B. Loranger deeded his interest in his father's estate to his wife, Minnie S. Loranger, the other defendant in this proceeding. This deed was recorded July 3, 1897. July 9, 1897, the mother of Philip B. Loranger died; and, within a few hours after her death, Philip B. Loranger made a quit-claim deed of his interest in his father's estate to his wife. The bill in this case alleges these conveyances are fraudulent as to the complainant, and is filed to have them set

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aside, and the land conveyed subjected to levy and sale to satisfy complainant's judgment.

It is claimed on the part of the defendants that the conveyances are not fraudulent, but were made for a proper purpose. The case was tried in open court, and nearly all the testimony was taken in the presence of the circuit judge. The testimony on the part of defendants shows they were married in 1870. It tended to show that one month thereafter $3,000 was paid to Mrs. Loranger by an insurance company upon a policy of insurance made for her benefit by her brother, who died shortly before her marriage. Two or three years after his marriage, Philip B. Loranger became a member of the firm of Lafountain & Loranger. This firm remained in existence until June, 1883. Mr. Loranger contributed his time. Mr. Lafountain was supposed to be the capitalist of the firm. The financial crisis of 1873 affected the business of the bank, and it suffered heavy losses. It was also the victim of a disastrous burglary. After the $3,000 was paid to Mrs. Loranger, it was put at interest, and mortgages were taken in her name. The interest on these mortgages was paid to Mr. Loranger, and used by him. He also used the principal—nearly all of it—for the use of the bank. The defendants allege the money was used upon an agreement that, if Mr. Loranger could not repay his wife sooner, he would pay her out of his interest in his father's estate, when he should receive it. It is claimed by them that the conveyances which were made were simply the carrying out of this agreement, and that no fraud whatever was perpetrated upon anybody.

After the banking firm was dissolved, Mr. Loranger became interested in some mining property in Colorado, which he subsequently conveyed to his wife. The assignee of the banking firm filed a bill to have this conveyance set aside. It is said by the complainant that Mrs. Loranger's answer in that proceeding is inconsistent with her present claim. The circuit judge found the transaction was not fraudulent; that the property conveyed did

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not exceed in value the amount of the indebtedness; and that the making of the conveyances was simply carrying out a proper agreement which was made at the time the money was borrowed from the wife by the husband. We think this finding was fully justified by the testimony. We have not overlooked the familiar rule of law that transactions of this character between husband and wife should be carefully scrutinized. We have also considered the provisions of Act No. 99, Pub. Acts 1897, which provide that complainant shall make a *prima facie* case on a bill filed in aid of execution by introducing his judgment, execution, and levy, and proof of the conveyance complained of, and that thereafter the burden of proof shall be upon the judgment debtor, or persons claiming under him, to show that the transaction is in all respects *bona fide*. We do not deem it necessary to recite the testimony in detail. It will be sufficient to say it fully meets the requirements of the rule of law in relation to dealings of this character between husband and wife, and the provisions of the statute as well.

The decree is affirmed, with costs of this court.

GRANT, C. J., MONTGOMERY and HOOKER, JJ., concurred. LONG, J., did not sit.

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FERRIS *v.* HOME LIFE ASSURANCE CO.

LIFE INSURANCE—MISREPRESENTATION—DIRECTED VERDICT.

A life-insurance policy was based upon a written application which stated, among other things, that the applicant had never been refused insurance; nor been given an unfavorable opinion by a physician with reference thereto. In an action on the policy, the medical examiner of a benefit association testified that, prior to the application in question, he had examined decedent upon his application for membership in the order, and had found traces of Bright's disease, and had so informed him, but had withheld the report at decedent's request. There was evidence, also, that decedent had told a member of the order that he was ineligible because of the examination. The records of the lodge did not disclose the application, but it was shown that it was not the custom to record applications unless accompanied by the report of the examiner. The only evidence relied on by plaintiff to contradict this showing of misrepresentation was the statements of the insured in his application, and certain statements by the medical examiner as to the result of his examination, claimed to be inconsistent with his testimony. *Held*, that defendant was entitled to have the verdict directed in its favor.

Error to Wayne; Frazer, J. Submitted October 20, 1898. Decided November 9, 1898.

Assumpsit by Paulina Ferris against the Home Life Assurance Company on a policy of insurance. From a judgment for plaintiff, defendant brings error. Reversed.

John W. McGrath, for appellant.

James H. Pound, for appellee.

MOORE, J. The husband of the plaintiff was insured in the defendant company. The plaintiff was the beneficiary

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named in the policy of insurance. After the death of the husband, the company declined to pay the insurance. The plaintiff brought suit, and obtained a judgment after a trial by jury. The case is brought here by appeal.

In 1895, the husband of the plaintiff was insured in the Michigan Masonic Mutual Benefit Association. In September, 1896, this company retired from business, and defendant company took over the insurance of Mr. Ferris, and issued to him a policy containing, among other conditions, the following:

"In consideration of the payments and the representations, agreements, and warrants made by the insured herein named in his original application made to the Masonic Life Association of Grand Rapids, Michigan, and upon which application said association issued its policy No. 6,468, which application, and the articles of association and by-laws of this company, are hereby made a part of this policy, and in further consideration of the acceptance of this policy, with the stipulations and conditions herein contained, by said insured, during his lifetime and while in good health, * * * this company does hereby issue this policy."

In the original application, signed by Mr. Ferris, were the following questions and answers:

"*Question No. 8.* Has any proposal or application to insure your life ever been made to any company or agent upon which a policy has not been issued? If so, state full particulars.

"*Answer.* No.

"*Question No. 9.* Has any physician given an unfavorable opinion upon your life with reference to life insurance? If so, state particulars.

"*Answer.* No."

Mr. Ferris died February 17, 1897. In the application it was stated the questions were truthfully answered, and that they "are considered as an essential part of the application, and as forming, with it, the basis of a proposed contract of insurance." It is claimed by way of defense that these questions were untruthfully answered, and by the answers such fraud was practiced upon the company as to avoid the policy.

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The testimony on the part of the defendant showed that, in the summer of 1894, Mr. Sirrine, master workman of Eureka Lodge, A. O. U. W., took the written application of Mr. Ferris to become a member of that lodge, and delivered it to the recorder, who retained it for about three months, waiting for the medical examination to be presented; but, as it did not come, the application was destroyed. It also appears from the record that in August Mr. Ferris was examined by the medical examiner of the lodge five times. The medical examiner testified that he found traces of Bright's disease, and so informed Mr. Ferris. He said he usually informed the grand medical examiner of the result of his examinations, but did not in this case, because of the request of Mr. Ferris, who said, if the officer made the report, he could not get other insurance. The record also shows that in November, 1895, Mr. Ferris was urged by a member of Detroit Lodge, A. O. U. W., to become a member of that lodge, and told the member he was not eligible, because he had been examined by the medical examiner, who told him he had Bright's disease. The only testimony that tended in any way to lessen the force of this testimony was the answers made by Mr. Ferris to the questions in the application itself, and some statements made by the medical examiner as to the result of his examination, which it is said were not consistent with his testimony; and the further fact that the records of the lodge did not show Mr. Ferris ever applied for membership. This testimony did not tend to show the medical examiner did not make the examination as testified by him. It was also shown that no record was made of an application unless accompanied by the report of a medical examiner. The circuit judge was requested to direct a verdict in favor of defendant. He thought there was some evidence for the jury, and submitted the case to them.

It is a right which insurance companies have to be truthfully informed whether an applicant for insurance has before then applied for insurance, and been rejected,

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and to know whether a medical examiner has declined to give a favorable opinion upon his application for insurance, so that the persons whose duty it is to act upon the application upon the part of the company may act intelligently. *Brown* v. *Insurance Co.*, 65 Mich. 306 (8 Am. St. Rep. 894); *Finch* v. *Modern Woodmen of America*, 113 Mich. 646. There is no testimony in the case which tends to discredit the testimony on the part of the defendant that Mr. Ferris did apply to the Ancient Order of United Workmen for insurance, and that their medical examiner advised him he was not a proper subject for insurance. The judge should have directed a verdict in favor of defendant. *Lange* v. *Perley*, 47 Mich. 355; *Corbett* v. *Spencer*, 63 Mich. 731; *Township of Medina* v. *Perkins*, 48 Mich. 67; *Dondero* v. *Frumveller*, 61 Mich. 440; *Hunt* v. *Order of Chosen Friends*, 64 Mich. 671 (8 Am. St. Rep. 855); *Gillett* v. *Knowles*, 97 Mich. 77.

Judgment reversed, and new trial ordered.

GRANT, C. J., MONTGOMERY and LONG, JJ., concurred. HOOKER, J., did not sit.

CENTRAL NATIONAL BANK OF CLEVELAND *v.* GRAHAM.

1. CREDITOR'S BILL — VALIDITY OF JUDGMENT — PRESUMPTIONS.
   The presumption of the validity of a judgment cannot be overcome by an allegation in the answer to a creditor's bill, that the judgment on which the bill is founded was upon notes, in the giving of which defendant "was grossly swindled," that he was not aware of the trial when the case was tried, and that the trial was a conspiracy on the part of complainant and others.

2. SAME—RECEIVERS—EXAMINATION BEFORE COMMISSIONER—SUMMONS.
   A summons may be issued against a judgment debtor against

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whom a creditor's bill is pending, and for whom a receiver has been appointed, requiring him to appear before a circuit court commissioner for examination, although proof has not been made of service of the order appointing a receiver, where such order, a copy of which is before the commissioner, directs him to issue a summons on request.

3. SAME—CONTEMPT—STAY OF PROCEEDINGS.

A judgment debtor for whom a receiver has been appointed may be adjudged guilty of contempt in disobeying an order to attend a hearing before a circuit court commissioner for examination, although a petition taken by him to stay the receivership proceedings is pending, where no temporary stay preventing the judgment creditor from proceeding has been made.

Appeal from Wayne; Lillibridge, J. Submitted October 20, 1898. Decided November 9, 1898.

Judgment creditor's bill by the Central National Bank of Cleveland, Ohio, against James Graham. From an order denying an application to stay receivership proceedings, and adjudging defendant guilty of contempt in failing to respond to the summons of a circuit court commissioner, defendant appeals. Affirmed.

Bowen, Douglas & Whiting, for complainant.

John Galloway (*Elliott G. Stevenson*, of counsel), for defendant.

MONTGOMERY, J. The complainant on the 23d of March, 1898, recovered a judgment of $12,000 and upwards against the defendant in the Wayne circuit court. On the 12th of May following, a creditor's bill in the usual form was filed, and, on the 19th of May following, Henry G. Nicol was appointed receiver of the property of the defendant, by an order which also required the defendant to appear before a circuit court commissioner for examination. On the 16th of June a circuit court commissioner's summons was issued, requiring him to attend a hearing on the 23d of June of the matters in said case in

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reference before said commissioner. He failed to appear on the 23d of June, and a petition for an order to show cause why he should not be adjudged guilty of contempt was filed; and, upon an order to show cause being served, he made answer that, upon receiving a copy of the receivership order, he caused a petition to be prepared, praying that said order appointing the receiver be vacated or stayed until the issue made by his answer regarding the validity of the judgment upon which the proceedings were based be determined. The court on the 28th of June made two orders,—the one denying the application to stay the receivership proceedings, and the other adjudging the defendant guilty of contempt. The defendant appeals from both these orders.

It should be further stated that the defendant has filed an answer in the original suit, in which he sets up that the judgment obtained against him was obtained upon notes, in the giving of which he was "grossly swindled;" that he was not aware of the trial of the case at law when it was tried; that "the trial was a conspiracy on the part of the complainant, its agents, attorneys, and others, to prevent this defendant from presenting any further application for a continuance." It will not be necessary to determine whether the answer sets up any defense which can be recognized if the defendant should find himself able to establish the averments by proof. It is sufficient to say that the presumption of the validity of this judgment cannot be overcome by the averments of the answer, and it cannot be said that the circuit judge abused his discretion in refusing to vacate the order appointing a receiver. *Williams* v. *Hubbard*, 1 Mich. 446; *Turnbull* v. *Lumber Co.*, 55 Mich. 387; *Dutton* v. *Thomas*, 97 Mich. 93.

It is urged against the order adjudging the defendant guilty of contempt that the commissioner had no authority to issue the summons in question, requiring the defendant to appear, until he had before him proof of service of the order appointing a receiver. The order appointing a re-

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ceiver directs the commissioner to issue a summons upon request. A copy of this order was before the commissioner, and this was sufficient. *Whipple* v. *Stewart*, Walk. Ch. 357.

The only other claim which needs to be noticed is that the defendant could not be adjudged guilty of contempt pending the hearing of his petition to stay the receivership proceedings. The answer to this is that there was no temporary stay preventing the complainant from proceeding. The whole case indicates a purpose on the part of the defendant to delay proceedings.

The orders appealed from will be affirmed, and complainant allowed an additional solicitor's fee of $25.

GRANT, C. J., MOORE and LONG, JJ., concurred. HOOKER, J., did not sit.

BRITTON *v.* MICHIGAN CENTRAL RAILROAD CO.

1. TRIAL — ACCIDENT AT RAILROAD CROSSING — ARGUMENTS OF COUNSEL—PERSONAL OBSERVATIONS.
   It is error for the court to permit plaintiff's counsel, in an action for injuries at a railroad crossing, to state to the jury in his closing argument his own observations with respect to the opportunity for seeing the track from the highway, based upon a visit to the scene of the accident.

2. SAME—CONTRIBUTORY NEGLIGENCE—JUDGMENT OF ATTORNEY.
   Counsel has no right to place before the jury in an action for personal injuries, as tending to show that plaintiff was not guilty of contributory negligence, the fact that, by reason of his experience in damage suits, he would not have taken the case unless his client had satisfied him that he was free from negligence.

3. SAME—DAMAGES—COST OF LITIGATION.
   It is error for the court, in an action for personal injuries, to permit plaintiff's counsel to urge the jury to include in their verdict compensation to plaintiff for the expense of litigation and the trouble in prosecuting the claim.

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Error to Shiawassee; Smith, J. Submitted October 21, 1898. Decided November 9, 1898.

Case by Martinus S. Britton against the Michigan Central Railroad Company for personal injuries. From a judgment for plaintiff, defendant brings error. Reversed.

M. V. & R. A. Montgomery (*J. P. Lee*, of counsel), for appellant.

Watson & Chapman, for appellee.

HOOKER, J. The plaintiff was injured while riding in a buggy, through a collision at the crossing of a highway and the defendant's railway in the city of Owosso. In an action charging negligence he recovered a judgment, and the defendant has brought error.

It is unnecessary to consider all of the questions raised. The circuit judge seems to have overlooked the responsibility resting upon him to see that the defendant had a fair trial, and allowed counsel to present the case to the jury in a way calculated to arouse their prejudices. It is said in the brief that the rule of this circuit forbids interruption of counsel during an argument, no matter how far they wander from the record or transgress professional ethics. If this is true, we cannot commend the rule as a safe one to be applied upon all occasions. There is much that is intemperate in the argument of counsel in this case. Usually we assume that the circuit judge does his full duty in the premises, and do not reverse cases for such errors unless clearly injurious. Among the less violent, but improper, statements of counsel, we find the following in the record of his argument:

"These cars, instead of coming off straight at right angles, go straight in that direction, and as you go past them they are behind you, and block up your vision, so you look at an angle from behind you [illustrating on map]. Not only that, you get this pump works behind you; and when men talk about not shutting up the vision, I don't believe it. I have been over on Chipman street

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myself. You stretch a line of box cars away off about 800 feet,—about 60 or 70 rods,—and have it at this angle, when you are close to that track, naturally your line of vision is partially behind you, and the pump-house would shut your vision out; and I will guarantee to say that the men couldn't see that train, unless they had seen it back there nearly half a mile."

Again, he said:

"One thing I think you have noticed is that the firm of Watson & Chapman have tried a great many damage suits,—a great many damage suits. I think I have drawn more declarations in damage suits than any other man in this section of Michigan. I say, I believe more than any man in the State of Michigan, with the exception of one, and that is Mr. Hayden, of the Upper Peninsula. I think you will give me credit for knowing something what the law of damage is in cases of this kind. I know my Brother Geer gives me credit for knowing what it is, and so do you. Now, do you believe Mr. Britton came into the office of Watson & Chapman, and said he didn't stop at the railroad crossing, and Watson & Chapman undertook to try his case? No, sir; certainly we didn't. Nobody else would believe it."

And, continuing, he said:

"We have asked the jury for $10,000. I say in this case the old man ought not to have at least less than $5,000. He ought to have a good round compensation,—such compensation as will compensate him for the injury that has been inflicted upon him; something that is going to pay him for the litigation and fight he has got to make to get it. In this case I say, if ever a man was entitled to recover a good verdict, this is one of them."

It was error for him to state to the jury facts based on his own observation, or to argue, as proof that the plaintiff stopped before attempting to cross the railroad, that his counsel would not have commenced the action if he had not stopped. Nor should the jury have been asked to give the plaintiff compensation for the expense of litigation, or for trouble in prosecuting his claim. Had these things been promptly repressed, we might have passed them by as error without injury; but the record indicates that there was no effective restraint upon counsel.

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We also think that too great latitude was permitted in relation to the evidence of plaintiff's statements of his injuries and feelings. We think the court did not err in his refusal to take the case from the jury, and we are not disposed to review the exercise of discretion in permitting an amendment to the declaration.

The judgment is reversed, and a new trial ordered.

GRANT, C. J., MOORE and LONG, JJ., concurred. MONTGOMERY, J., did not sit.

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141 s255
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145 s289

DAVIS *v.* TOWNSHIP OF FRANKENLUST.

1. TOWNSHIPS—TRESPASS TO LANDS—VENUE.
   Whether a township may be sued in another county than that of which it forms a part, for a trespass to land in such other county,—*quære.*

2. INJUNCTION—CONTINUING TRESPASS.
   A trespass to land which is of a continuing nature, the constant recurrence of which renders the remedy at law inadequate unless by multiplicity of suits, may be relieved against by injunction.

3. PUBLIC OFFICERS—SUITS BASED ON OFFICIAL ACTS—VENUE.
   2 How. Stat. § 7549, providing that suits against public officers, based on official acts, shall be brought in the county where the cause of action arises, sustains the right of one whose lands are flooded by the action of highway officers of another county to sue in the county in which his lands are situated, although the water is set in motion in such other county, since no trespass is consummated until the water reaches the lands.

Appeal from Saginaw; Snow, J. Submitted November 1, 1898. Decided November 9, 1898.

Bill by Richard Davis against the township of Frank-

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enlust, Jacob Gates, and others, to restrain the further flooding of complainant's land, and for an accounting for damages already done. From an order overruling a demurrer to the bill, defendants appeal. Affirmed.

Crane & Crane, for complainant.

I. A. Gilbert (*James Van Kleeck*, of counsel), for defendants.

MOORE, J. This is an appeal from an order overruling a demurrer to a bill of complaint. Complainant filed a bill in chancery, alleging, among other things, that he is the owner of a farm, in the county of Saginaw, that borders on the county line between Bay county and Saginaw county, and that defendants are flooding his lands with water, which is brought to his farm by means of ditches constructed by defendants, making his lands useless for farming purposes. The bill alleges defendants are yearly increasing the amount of water thrown upon his lands, and threaten to enlarge the quantity by opening and extending more ditches; that the water so discharged creates a nuisance, and has done him much damage; and prays for an accounting for the damages done, and for an injunction to prevent the further flooding of his lands. The bill shows complainant's lands are in Saginaw county, while all the ditches which have been opened are upon land in Bay county, except such culverts as are made in the highway between the two counties. A general demurrer is interposed to the bill by all of the defendants. Only a portion of the reasons set up in the demurrer are discussed in the brief.

It is said the township of Frankenlust cannot be made a party to a suit in Saginaw county; citing *Pack, Woods & Co.* v. *Township of Greenbush*, 62 Mich. 122. Whether this contention is true, where the township is a trespasser to real estate situated in another county, is not decided by the case cited. If it is true, the case can be discontinued as to the township.

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It is claimed the complainant has no standing in a court of equity, because the acts of which complaint is made were done more than six years before the bill was filed, and complainant has an adequate remedy at law. The bill alleges the trespass to be a continuing and increasing one. The jurisdiction to grant injunctions to prevent trespasses upon lands, though sparingly exercised, is well established, where the trespass is of a continuing nature, whose constant recurrence renders the remedy at law inadequate, unless by multiplicity of suits. 1 High, Inj. § 697; 1 Wood, Nuis. § 376; *Gregory* v. *Bush*, 64 Mich. 37 (8 Am. St. Rep. 797).

It is also claimed the individual defendants opened ditches upon their own lands, which are all in Bay county, and would have resulted in no injury to complainant had it not been for the action of the highway officer of the township of Frankenlust, which township is in Bay county; and that no action can be maintained against that officer, and those who assisted him, except in Bay county,—citing 2 How. Stat. § 7549; *Graham* v. *Montcalm Circuit Judge*, 62 Mich. 147. These citations, instead of aiding defendants, are against them. What is the fact in this case which gives complainant a right to maintain this proceeding, if he has such a right? It is manifestly a trespass to his lands by causing to come upon them water in unusual quantities, to his injury. That trespass does not occur until the water reaches his land. It is true, some of the agencies which cause this result are set in motion some distance away from his land, and in the adjoining county. These acts would have constituted no cause of complaint had they not resulted in a trespass, and the act which constituted the trespass was the arrival and the spreading of the water upon the land of complainant in unusual quantities. The complainant resides in Saginaw county. The land injured is in that county. The trespass occurs upon the land in that county, and we think the chancery court of that county has jurisdiction to dispose of the case. 2 How. Stat. § 6611.

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The order overruling the demurrer is sustained, with costs, and defendants are allowed 20 days in which to answer.

The other Justices concurred.

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BECK v. RAILWAY TEAMSTERS' PROTECTIVE UNION.

1. EMPLOYER AND EMPLOYÉ — TRADES UNIONS — INTERFERENCE WITH PRIVATE BUSINESS.

The law will protect employers against the unlawful interference of trades unions in their right to employ whom they please, at such prices as they and the persons employed can agree upon, and to discharge them at the expiration of their terms of service or for violation of their contracts.

2. SAME—RIGHTS OF WORKINGMEN—LEGALITY OF ORGANIZATION.

Organization into unions by workingmen for the securing of better and uniform wages, and the use of persuasion to induce other workingmen to join the union, and to refuse to work except for the established wage, and the presentation of their cause to the public in newspapers or circulars, in a peaceable way and with no attempt at coercion, are lawful.

3. SAME—BOYCOTT.

But the boycotting of one who refuses to accede to the demands of the union is unlawful, where the means used to prevent persons from dealing with the person boycotted are threatening in their nature, and tend naturally to overcome, by fear of loss of property, the will of others, and compel them to do what they would not otherwise do, though unaccompanied by actual violence or threats of violence.

4. SAME—REMEDY BY INJUNCTION.

Injunction will lie to restrain a combination of persons from attempting to ruin complainant's business by bringing to bear upon his customers and employés intimidating and coercive means.

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5. SAME—PICKETING OF PREMISES—BOYCOTT CIRCULARS.
The picketing of the premises of a person boycotted, for the purpose of intercepting his customers and employés, and the distribution of "boycott circulars," containing statements wholly false as to his relations with his employés, pursuant to an avowed intention of ruining his business, though carried out without violence, are, in themselves, acts of coercion which may be enjoined.

6. SAME—FREE SPEECH—CONSTITUTIONAL LAW.
The duty of equity to enjoin the distribution of boycott circulars under such circumstances is not modified by the fact that under ordinary circumstances, where the destruction of property rights by coercive means is not involved, it cannot, under the Constitution (Const. Mich. art. 4, § 42), enjoin the publication of a libel.

Appeal from Wayne; Hosmer, J. Submitted June 15, 1898. Decided November 15, 1898.

Bill by Jacob Beck and others, copartners as Jacob Beck & Sons, against the Railway Teamsters' Protective Union, the Detroit Council of Trades and Labor Unions, George Innis, and others, to enjoin the boycotting of complainants' business. From a decree enjoining merely the use of violence or threats of violence, complainants appeal. Modified.

In order that there may be no misunderstanding of the issues involved we give the bill of complaint substantially in full:

"(1) Complainants are partners doing business in the city of Detroit, under the name of Jacob Beck & Sons, having their mill and place of business at 245, 247, 249, and 251 West Congress street. At their place of business, on West Congress street, aforesaid, they carry on a general milling business, namely, of manufacturing and milling cereal products. They also deal in oats, grain, meal, and other cereals, and have had for years a large trade established in the city of Detroit and elsewhere. In carrying on such business they always use a number of horses, trucks, and wagons for use in trucking and carrying from the elevators, the cars, and elsewhere the different cereals

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which they use in the process of manufacture and sale, and also in delivering said cereals, either manufactured or unmanufactured, to the elevators, cars, and other customers in the city of Detroit and elsewhere.

"(2) Complainants have built up and established a large and valuable city trade, and have a large number of regular customers throughout the city, who buy almost daily of complainants some of their products, sometimes sending their own wagons and teams for the merchandise so purchased, and at other times relying on complainants to deliver the same. The trade so built up they have had, until very recently, for a number of years, and is to quite a large extent a cash trade and a valuable one.

"(3) Complainants further aver that in July, 1897, they had in their employ five teamsters, named Michael Walpole, H. McHugh, C. Fox, W. Pfaff, and Edward Hopp. These teamsters had been in the employ of the complainants for some time. Early in July, 1897, the above-named teamsters came to the office of complainants, and requested that they be paid higher wages. Complainants, in answer to such request, asked the said teamsters how much they wanted, to which they replied that they wanted $9 a week for single wagons, and $10.50 for double wagons. Thereupon complainant George Beck asked said Walpole, McHugh, and others, last named, whether they would be satisfied if they were given those wages; whereupon said Walpole replied, in effect, as follows: 'The wages do not cut any figure, but it is the scale we want you to sign.' Said Walpole and others were then told that they could have a reply that same evening, said conversation being in the morning. In the evening of the same day, shortly after 6 o'clock, said Walpole, McHugh, and others came with another person, who they said was the delegate of the Railway Teamsters' Protective Union. They were asked what was meant by the scale which they demanded should be signed, whereupon they produced a written agreement which they had already prepared. A copy of this agreement is hereto attached, and made a part of this bill.

"Complainants not having examined said written agreement called the 'Scale,' it was agreed that the complainants should have a week to examine and consider the same. Subsequently complainants examined the agreement, and on or about the 1st day of August informed the executive committee of the Railway Teamsters' Protective

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Union, who seemed to have the matter in charge, and particularly one George Innis, representing said union, that they (the complainants) had decided not to sign the scale, and refused to sign the same. In the meantime complainants' horses had all been sent to their farm in the country, near Plymouth, and all of the trucking and teaming of the business of complainants had been turned over temporarily to the Shedden Cartage Company, Limited, and to Ferguson & Co. At the time said executive committee called, being on or about the 1st of August, complainants informed them of the last-named facts; also that they, the complainants, would bring their teams back from the farm in the fall, and that they would inform them when their teams would be put at work again. About the time that the complainants' teams were sent out into the country, and having no further use then for said teamsters Walpole, McHugh, Fox, Pfaff, and Hopp, they were so notified, and quit working for complainants. In the meantime the said Walpole, McHugh, Fox, Pfaff, and Hopp, as complainants are informed and believe, and so allege, had joined the association called the Railway Teamsters' Protective Union. Some time after they had been discharged, and after they had joined said union, said Walpole, Pfaff, and Hopp came to complainants, and informed them that they had been out of employment ever since they had left the employment of complainants, represented that they were without means to support their families, and that their families were in want; and thereupon complainants, although their teams were still in the country, and having no use for their teamsters, employed said Walpole, Pfaff, and Hopp for work in their mill as extra men. They continued to employ said men in their mill until October 25, 1897. At the time said men returned to the complainants' employ they informed complainants they had withdrawn from the Railway Teamsters' Protective Union.

"(4) Complainants further allege that on Saturday, October 23, 1897, they informed George Innis, a resident of Detroit, who belongs to the Railway Teamsters' Protective Union, and who is the walking or traveling delegate of the Railway Teamsters' Protective Union, that they intended putting on their own teams again on Monday, October 25th, and that the three men who went out and joined their union, namely, Walpole, Pfaff, and Hopp, before mentioned, would on the 25th day of Octo-

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ber again start driving for complainants. Complainants so informed Innis simply because they had agreed to so inform him, and as he represented the Railway Teamsters' Protective Union. Complainants further allege that on the morning of the 27th of October said George Innis, with a large number of others, whom said Innis represented belonged to the Railway Teamsters' Protective Union, and were members or members of committees thereof, numbering in all from 15 to 20, appeared in the street in front of the mill of said complainants, on Congress street. Your orators are unable at the time of filing this bill to ascertain the names of all of the parties who accompanied said Innis, but they were informed by said Innis, and also by a number of the other men, that they belonged to the Railway Teamsters' Protective Union, and they were also then informed by said Innis that the purpose of said Innis and his associates there, and the purpose of said Railway Teamsters' Protective Union, was, by threat and by organized effort and by boycotting, to prevent and persuade and compel people from having any business relations or dealings with the said complainants, Jacob Beck & Sons, and to prevent, if possible, any teams of customers from visiting complainants' mill and place of business, and also to prevent any teamsters continuing in or entering the employment of said Jacob Beck & Sons, until said Jacob Beck & Sons had signed the 'Scale' heretofore referred to.

"And your orators allege and charge that said George Innis, as walking or traveling delegate or representative of the Railway Teamsters' Protective Union, and the Railway Teamsters' Protective Union, acting through its representatives and members, and its committees or walking delegates, so called, are unlawfully and wrongfully combining and confederating together to prevent, by intimidation and threats, all persons from patronizing complainants, or buying merchandise from them, or visiting their mill premises for business purposes; and that the said Railway Teamsters' Protective Union, the said George Innis, and his associates and confederates, whose names are at this moment unknown to these complainants, began, and have since constantly pursued, a course of threats and intimidation and persuasion for the purpose, by means of such intimidation and threats and fear, not only to prevent customers from buying of complainants, but also to intimidate and prevent the employés of com-

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plainants from continuing in their employ, and from peaceably or otherwise pursuing their work in complainants' mill. And your orators show that the said George Innis, the said Railway Teamsters' Protective Union, and its members, and also the members of the Detroit Council of Trades and Labor Unions, hereinafter mentioned, have intruded into the mill premises and buildings where the men employed by your orators were at work, and have solicited men who were peaceably pursuing their avocations, and who were satisfied to remain in the employment of your orators, and also have threatened and attempted to intimidate them, to quit the employment of your orators, with the purpose and intent, as your orators charge, of preventing your orators from continuing their said business, and thus to force your orators to submit to the terms proposed in said scale; that said solicitation of the employés of your orators, and said intrusion into the places where said men were at work, and into the mill of your orators, constituted an unlawful interference with the business of your orators, and that the persons who have been so soliciting the employés of your orators, and who have been guilty of such intrusion and interference with the business of your orators, are, with few exceptions, unknown to your orators.

"(5) Your orators further allege that, about 11 o'clock on the 27th day of October, John Strigel, who your orators allege is president of the executive board of the Detroit Council of Trades and Labor Unions, and William Campbell, who complainants understand is a patternmaker, and W. Goar, who complainants understand is a machinist, all officers of the Detroit Council of Trades and Labor Unions or of the Railway Teamsters' Protective Union, came to the office of complainants, and after a few minutes' discussion they were told that the complainants would not sign their scale nor their agreement, and would insist upon their right to continue to carry on their work and their business in their own way, so long as the same was done legally, and that they would continue to carry on their work with their own teams and teamsters; that they were paying their teamsters all that said teamsters asked or demanded; that said teamsters were satisfied with their work and with their employment, and were not complaining. Thereupon, and after said complainants had so informed the last-named defendants, to wit, said Strigel, Campbell, and Goar, said

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Campbell gave complainants to understand and notified complainants that they, the said Detroit Council of Trades and Labor Unions and the Railway Teamsters' Protective Union, their officers and members, would ruin the business of Jacob Beck & Sons. They further stated that they had already financially ruined a cooper in the city of Detroit, who a few years ago was worth $50,000, and who would not pay or join their union; that they had boycotted him, and they had ruined him by said boycott; and that he had been compelled to mortgage his property. This statement was so made, as complainants allege, for the purpose of intimidating, and by such intimidation compelling complainants to sign what is known as the 'Scale;' and complainants allege that at this time there was no one in their employ, either teamster or laborer, who was asking any raise in their wages, and that, so far as complainants know, all of their employés were satisfied with the terms of their employment, and are still.

"(6) And your orators show that the Railway Teamsters' Protective Union is an organization existing in this State and other States, having in this State, in the city of Detroit, a local subdivision called the Railway Teamsters' Protective Union No. 5,872; that such organizations are voluntary associations, whose proceedings are secret. Your orators allege that the present officers of the Railway Teamsters' Protective Union are as follows: President, William Thoms; secretary, Robert B. Camp; and that George Innis, the person referred to in this bill, is the traveling delegate of said Railway Teamsters' Protective Union.

"Your orators further show that the Detroit Council of Trades and Labor Unions is the Detroit branch of a national association, and that its officers are John Davidson, president; Herbert Greville, vice president; Alex. H. Smith, recording and corresponding secretary; John Strigel, financial secretary; and Jeremiah Sullivan, treasurer; that the proceedings of said Detroit Council of Trades and Labor Unions are, as your orator George Beck is informed, secret. Said association or organization is, through its officers and members, co-operating and combining with and assisting said Railway Teamsters' Protective Union in their efforts, by threats and intimidation, to compel your orators to sign the scale aforesaid, and also to prevent employés not members of said Railway Teamsters' Protective Union to continue in the employment of said

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complainants, and also to boycott and interfere with and ruin the business of your orators, by driving away their trade, and by the means aforesaid compelling the public not to deal with or patronize your orators.

"(7) And your orators allege that the persons who have been so congregating and loitering in front of, and in the neighborhood of, complainants' premises, and so soliciting the employés of complainants, and who are so guilty of other threats and acts of intimidation, as herein alleged, and who are guilty of such intrusion and interference of the business of said complainants, are, with few exceptions, unknown to your orators, and are too numerous for your orators to make them parties to this bill of complaint; but your orators aver and show that all of said Railway Teamsters' Protective Union, and all of the members of said Detroit Council of Trades and Labor Unions, in so far as said organizations and practices are unlawful and against the legal rights of your orators, are in combination and are associated together in an unlawful enterprise, and that your orators should not be obliged to make all of said members of said associations who may from time to time be guilty of such interference of the business of your orators parties to this bill of complaint, but that your orators should be permitted to proceed against the representatives of said Railway Teamsters' Protective Union and said Detroit Council of Trades and Labor Unions, to wit, the walking delegates, officers, strike committees, and such other members of such unions who may be known to your orators, or whose names may be ascertained from time to time, and who are guilty of the unlawful practices herein alleged. Your orator George Beck states that he has made personal inquiries of said Innis, and in the presence of a large crowd of others who are associated with him for the purpose herein named, to ascertain the names of the other persons whose names are not herein alleged, and that he was refused such information.

"(8) And as showing the purpose of the Detroit Council of Trades and Labor Unions and said Railway Teamsters' Protective Union, said George Innis and others, members or officers of said unions, who are all combining together for the purpose of ruining the complainants' business, they state: On the evening of October 27, 1897, B. B. Allen, a customer of complainants, sent his team to their mill. Said team was driven by one Joseph Grindell. The driver stopped his team in front of complainants' mill,

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and immediately a large crowd of men, headed by said Innis, surrounded said Grindell, and endeavored, by threats and intimidation and persuasion, to induce him to go away without patronizing the complainants, and without getting what he came to their mill for. They did induce said Grindell to go to a telephone for the purpose of informing his employer what the demands of said Innis and others were, but said Grindell returned to the complainants' mill subsequently, and took his load of oats. On the same day, to wit, October 27th, said George Innis informed Roundsman Walpole that up to that hour, 5 o'clock, he, the said Innis, had stopped 15 teams from going into the place of business of Jacob Beck & Sons, all of which said teams complainants allege were going there for the purpose of making purchases and doing business with complainants; and complainants further allege that heretofore their local cash daily sales have been about $100; that on the 26th day of October they were $99.04; and that on the 27th day of October, the day when said Innis claimed that he and his associates, confederating and conspiring and combining together to ruin complainants' business, had stopped the 15 teams, such transient sales were only $33.44, showing a large loss to complainants, arising solely, as complainants allege, through the conduct of said Innis, said Railway Teamsters' Protective Union, and the Detroit Council of Trades and Labor Unions, and the followers of said Innis, and members and officers of said organizations.

"(9) Complainants further allege that about 3:30 on the 28th of October, 1897, one Alex. McIsaac, doing business at 1146 Grand River avenue, called at complainants' mill for feed, being a regular customer of complainants, and that said McIsaac was stopped in front of the entrance to the mill by said Innis and his followers, said Innis being apparently the ringleader, and was strongly urged and persuaded not to buy any goods from Jacob Beck & Sons; that, in addition to persuasion, said Innis and his followers used threatening words, and used threats, and almost violence, and that such language used was so strong that Roundsman Walpole, who was present to protect complainants' property, ordered the crowd to leave the man and team alone, and in this way only was said McIsaac free to patronize said complainants. And your orators further charge, on information and belief, that the above are not the only instances where said Innis and his associ-

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ates have attempted, by threats of boycott and intimidation, to drive away the customers of your orators, but that said Innis and his associates have visited a large number of customers of complainants for this purpose, and have threatened them with boycott, and with injury to their business, in case they continued to trade with said complainants, and have distributed to them boycott circulars similar to those herein set forth.

"(10) And your orators further show that on the 28th day of October, 1897, and also on the 29th day of October, there appeared in front of complainants' mill said Innis and divers and sundry other persons, members of said union, at least 15 in number, who are their associates and confederates, and from early morning until late at night constantly hung and loitered about complainants' mill, at the place aforesaid, and upon the streets in close proximity, for the purpose of picketing the premises of complainants, and for the purpose of preventing complainants' customers from entering complainants' premises, and that one of the means of doing this was by the distribution of a boycott circular. One of said circulars is hereto attached. Circulars similar to the one attached were distributed by said Innis and his confederates and associates, representing themselves to complainants to be members of the Detroit Council of Trades and Labor Unions and the Railway Teamsters' Protective Union, to almost every team or person who entered or passed the mill of complainants, and to customers of complainants. Complainant George Beck personally saw a large number of these circulars distributed to customers of his firm; and complainants allege that when these circulars were delivered to their customers, many of whom were grocers and feed dealers in different parts of the city, they were accompanied by a threat from said Innis and his associates, confederating together, that, if the customer continued to trade with Jacob Beck & Sons, his, the customer's, trade would be ruined. And complainants allege that the distribution of these boycott circulars was continued on the 29th of October, and is being continued, by said Railway Teamsters' Protective Union, Detroit Council of Trades and Labor Unions, and their officers and members, and George Innis, and others before mentioned, and that the distribution of these boycott circulars is calculated to and will injure or ruin the business of the complainants, and that they are being distributed for this

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purpose, and as one of the means of carrying out the threat made by said Innis and his associates that they would ruin the complainants' business before they had finished with them.

"And complainants allege, in reference to the statements made in said circular, that they have never entered into an agreement with the Railway Teamsters' Protective Union or the Detroit Council of Trades and Labor Unions in July, 1897, that they would employ none but union men thereafter, and complainants deny that they have discharged any union men and hired nonunion men in their places, but, on the contrary, state that the teamsters who left their employ and joined the union were not discharged because they were union men, but subsequently left said Railway Teamsters' Protective Union, as complainants are informed, and returned to work for complainants, and said Walpole, Pfaff, and Hopp are now working for complainants.

"(11) Your orators further charge that the said Detroit Council of Trades and Labor Unions, and the said Railway Teamsters' Protective Union, said George Innis, and the officers, committees, and walking delegates of said organizations, have and are still willfully and maliciously combining together in intimidating and threatening persons in the employ of the complainants from remaining in their employ, and that they have threatened several of complainants' employés, particularly said Pfaff, with personal violence if he continued to remain in complainants' employ; and they allege and charge that the Detroit Council of Trades and Labor Unions, and said Railway Teamsters' Protective Union, George Innis, John Strigel, William Campbell, William Goar, John Dernberger, James Cochrane, Frank Ladd, William Singleton, Herbert Sheldon, George Wilson, Sanford S. Diamond, J. W. Morris, and Charles Fox, their agents, servants, confederates, and the committees, members, officers, and walking delegates of said Detroit Council of Trades and Labor Unions and Railway Teamsters' Protective Union, have conspired and combined, and are conspiring and combining, to boycott complainants and their business by means of the circular aforesaid, by intimidation of customers, by visiting customers of complainants at their places of business, and threatening them with boycott in case they continued to trade with complainants, by gathering in threatening crowds in front of and in the neighborhood of com-

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plainants' place of business, by threatening with violence employés of complainants, by the distribution of circulars, etc., and generally injuring complainants in their said business, and preventing them from carrying on the same, and that their acts in the premises have required the attendance of several policemen constantly for the last three or four days in order to prevent violence, and to enable complainants in any manner to use their wagons and carry on their business; and they allege and charge that said parties last named and said members of said associations, if allowed to continue the acts which they are now committing, or allowed to gather in threatening crowds in front of complainants' mill, or allowed to interfere, as they have, with complainants' customers and employés, that the business carried on by the complainants, which is a large one, and the good will of which is of large value, will be seriously injured, if not ruined.

"(12) And complainants allege that they are entirely without remedy at law, and can only be fully protected and relieved in a court of equity."

The prayer of the bill is that defendants be enjoined:

"(1) From in any manner interfering with the employés of the complainants now in the employ of your orators, and from in any manner interfering with any person who may desire to enter the employ of your orators, by the way of threats, personal violence, intimidation, or other means calculated or intended to prevent such persons from entering or continuing in the employment of your orators, or calculated or intended to induce any such person or persons to leave the employment of your orators.

"(2) From boycotting your orators, either by the distribution of circulars or handbills or otherwise.

"(3) From interfering, intimidating, boycotting, molesting, or threatening in any manner the customers of your orators, or any other person or persons, with the purpose of inducing such person or persons not to deal with or do business with your orators.

"(4) From congregating or loitering about or in the neighborhood of the premises of your orators, or at other places, with intent to interfere with the employés of your orators, or with the prosecution of their work, or to interfere with or intimidate the employés of your orators with intent to cause them to leave the employment of your orators, or to interfere with or obstruct in any manner the

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business or trade of your orators, and to prevent or induce the public not to trade with or deal with your orators.

"(5) From interfering with the free access of employés of your orators to your orators' premises, and their places of work, and the free return of said employés to their places of business or their homes.

"(6) From impeding, obstructing, or interfering with, by boycott, threat, or otherwise, the trade or customers of your orators, with the purpose of inducing them not to patronize or deal with your orators.

"(7) From giving any directions or orders to committees, associations, or otherwise for the performance of any such acts or threats hereinbefore enjoined, and from in any manner whatsoever impeding, obstructing, or interfering with the regular operation and conduct of the business of your orators.

"(8) And for such other and further relief as shall be deemed equitable."

That part of the scale or contract presented to the complainants by the union, essential to note, is as follows:

"Any difference that may arise between you and ourselves that cannot be settled by the delegate or committee, except the question of wages (provided for above), to be submitted to a board of arbitration, which board is to consist of three members, one of whom shall be selected by you, another by ourselves, and the third by the two arbitrators selected as above provided. A man laid off for any cause shall receive prompt investigation, and, if found to have been in fault, may be discharged, or taken back at loss of pay, as you may determine; but, if found not to have been in fault, he shall receive pay for the time laid off. Each new man entering your employ shall be paid union wages, and shall be provided with a working card by the union; and each such new man, if found capable by you and satisfactory to the union, shall become a member thereof, at the second regular meeting from the time of his entering your employ. But, if he is found not to be a capable man, you shall notify the delegate or committee within thirty (30) days, counting from the first day of his entering your employ. But in no case shall a nonunion man be employed while a capable union man is unemployed. And *provided, further*, that the union reserves the right to reject any man not complying with its rules and regulations, and after such rejection you shall

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not continue him in your employ, after having been duly notified of such rejection by delegate or committee of said union. Any man selected by said union to act as delegate or on committee shall retain the same place as previously held by him in your employ, after his term of delegate or on committee has expired. Should a slack time occur, and you have not sufficient work for all the men in your employ, and for that reason you find it necessary to reduce your expenses by laying off some of the men, *the men last employed shall in all cases be the first laid off.* The above clause subject to our mutual agreement made on the attached list. If the freight departments and business houses close at an earlier hour on Saturdays than on other days, and the men are sent to the barn, they shall not, on account of the earlier closing on that day, receive less than a full day's pay. * * * It is also agreed that Jacob Beck & Sons are to have the privilege of employing one single teamster on the light, quick-delivery wagon at the rate of $8.00 per week; if employed on any other truck, he shall receive the regular scale: *Provided, further,* that no other man can be found at the time to be put on."

The boycotting circular is as follows:

"BOYCOTT
"JACOB BECK & SON'S FEED MILLS.
"To Organized Labor and Their Friends:

"The above firm has broken faith with the representatives of the Trades Council and the Railway Teamsters' Union, by annulling an agreement entered into with the above organizations in July last, that none but union men should be employed by that firm thereafter.

"They have now discharged their union men, and hired nonunion men to take their places. We therefore ask all people who believe in living wages and fair treatment of employés to leave this firm and their product severely alone.

"BOYCOTT BECK & SON.
"By order of DETROIT TRADES COUNCIL."

The Council of Trades and Labor Unions, the Teamsters' Union, and Walking Delegate Innis each filed a separate answer. It is unnecessary to state these answers in full. They all deny the use of intimidation and threats as alleged in the bill of complaint. The answer of the council alleges that, at the request of the Teamsters'

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Union, they called upon complainants, and attempted to settle the dispute; that they did not succeed; and that thereupon they indorsed the boycott established by the Teamsters' Union.

The answer of the Teamsters' Union alleges that—

"They insist that they have a perfect legal right to advise dealers and consumers not to use goods sold and manufactured by nonunion firms, and as union men they have a perfect right to refuse to trade with retail dealers who deal in goods commonly known as 'scab goods,' which they admit they did do."

The second paragraph of defendant Innis' answer is as follows:

"This defendant further avers that he did not at any time appear at or near the premises of said complainants with other members of the said union for the purpose of threatening, by organized effort, to compel any person or persons not to have any business relations with the said complainants, or to threaten and compel any teamster not to continue in or enter the employment of said complainants, until said complainants had signed the scale, as is alleged by said complainants in paragraph 4 of their bill of complaint, but that he did appear there with other members of said union upon the public street, and not upon the premises of said complainants, for the purpose of explaining to people passing and repassing from said complainants' place of business the treatment said union had received from said complainants, and to then and there leave the matter to the best judgment of the said people as to what they should do in relation to dealing with said complainants."

They all assert that their acts were legal and proper.

Upon the filing of the bill a preliminary injunction was issued. Issue was duly joined, and proofs taken in open court. A large amount of testimony was introduced by the complainants, but none on the part of the defendants. The court entered the following decree:

"This cause having come on to be heard upon the bill of complaint herein, answers thereto, the replication of the complainants to such answers, and the proofs taken in

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such cause in open court, and having been argued by the counsel for the respective parties, and the court having duly considered the same, it is ordered, adjudged, and decreed as follows: That each and all of the said defendants in this cause be, and are hereby, permanently enjoined, and each and all of said defendants are hereby ordered from this day to absolutely desist and refrain from:

"(1) In any manner interfering with the employés of the complainants, Jacob Beck, George Beck, and Jacob F. Beck, copartners as Jacob Beck & Sons, now in the employ of said Jacob Beck & Sons, and from in any manner interfering with any person who may desire to enter the employ of said Jacob Beck & Sons, by way of threats, personal violence, intimidation, or other unlawful means calculated or intended to prevent such persons from entering or continuing in the employ of said Jacob Beck & Sons, or calculated or intended to induce any such person or persons to leave the employ of said Jacob Beck & Sons.

"(2) From interfering, intimidating, boycotting by violence, molesting, or threatening in any manner the customers of said complainants, Jacob Beck & Sons, or any other person or persons, for the purpose, by means of such interference, intimidation, boycott, or threats, of inducing such person or persons not to deal with or do business with said Jacob Beck & Sons.

"(3) From congregating or loitering about or in the neighborhood of the premises of complainants, Jacob Beck & Sons, or at other places, with intent to interfere with the employés of said complainants, Jacob Beck & Sons, or with the prosecution of their work, and to interfere with or intimidate the employés of said complainants with intent to cause them to leave the employment of complainants, or to interfere with or obstruct in any manner the business or trade of said Jacob Beck & Sons, and to prevent or induce the public, by means of boycott circulars or threats of boycott, or by threats of injuring the business of any person or persons, not to trade or deal with the said Jacob Beck & Sons.

"(4) From interfering with the free access of employés of Jacob Beck & Sons to Jacob Beck & Sons' premises, and their place of work, and the return of said employés to their places of business or their homes.

"(5) From impeding, obstructing, or interfering with, by boycott, violence, threat, intimidation, or otherwise,

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the trade or customers of said Jacob Beck & Sons, with the purpose or intention of inducing them not to patronize the said complainants.

"(6) From giving any directions or orders to committees, associations, or otherwise for the performance of any such acts or threats hereinbefore enjoined, and from in any manner whatever impeding, obstructing, or interfering with the regular operation and conduct of the business of complainants.

"(7) It is further ordered, adjudged, and decreed that nothing hereinbefore contained shall be construed as inhibiting the peaceable distribution of circulars such as is attached to the bill of complaint in this cause, or circulars similar thereto, to customers of said Beck & Sons, or to the public, in the vicinity, but not in front, of the mill or premises of said complainants, Jacob Beck & Sons, or inhibiting any peaceful appeal to refrain from their business relations with said Beck & Sons.

"(8) And it is further ordered, adjudged, and decreed that said injunction shall not be construed as inhibiting said defendants from threatening to boycott, except by violence, or from boycotting by peaceful means, or from the distribution of said boycott circulars, such as is attached to the bill of complaint in this cause, or circulars similiar thereto, to said customers or to the public, or from threatening to injure, affect, or ruin the business of said customers of said Jacob Beck & Sons, or others, by any effort to compel or induce said customers or others to refrain from business relations with said Beck & Sons, which effort shall not be accompanied with violence or threat of violence."

Bowen, Douglas & Whiting, for complainants.

Peter E. Park and *T. E. Tarsney*, for defendants.

GRANT, C. J. (*after stating the facts*). The allegations of the bill are fully sustained by the evidence. When complainants' teamsters presented the contract to them in July, they informed complainants that it was not so much the wages, but it was "the scale they wanted them to sign." The teamsters did not have the contract with them, and again called in the evening, with the defendant

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Innis. The contract being a long one, complainants took time to consider it; and when Innis and the teamsters called, a few days afterwards, complainants declined to sign it, and informed Innis and the teamsters that they had made arrangements with the Shedden Truck Company and others to do their trucking during the summer. The Shedden Truck Company employed only union men. Complainants also employed one Richardson, who owned a team, and was not a member of the union, to do some teaming. The union teamsters immediately began obstructing Mr. Richardson in his work, by getting in his way, and howling at him; and, when Mr. George Beck came up on his bicycle, some one in the crowd cried out: "Here is a rope. Hang Beck with that. That is the fellow you want." Some sticks and bricks were also thrown. A policeman was called, and then the union teamsters gave Mr. Richardson the right of way. Meanwhile crowds collected in a threatening manner around the mill to watch those going to purchase and to endeavor to stop them. Two policemen were called in to preserve order. This state of affairs continued for about a week, during which time customers were intimidated and frightened away, and the Shedden Truck Company forced to refuse to do trucking for complainants. The boycotting circular was issued, and it was distributed to complainants' customers and others by the representatives of the union, in the streets and elsewhere.

On August 7th the executive committee from the Council of Trades and Labor Unions, accompanied by Mr. Innis, visited complainants, and endeavored to persuade them to sign the agreement. Union teamsters to the number of 10 or 15 were then outside in the street, making considerable noise. Complainants refused to sign the scale, and informed their visitors that they had employed the Shedden Truck Company to do their trucking for the summer, and that when they brought their teams back in the fall they would notify the union. This pacified the union, though the result was to throw the five teamsters

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then belonging to the union and employed by complainants out of employment. In October complainants brought back their teams, and notified Innis of the fact, and that they should employ their own teamsters, and would not sign the contract. Then the Teamsters' Union, defendant Innis, and others, evidently with the approval of the Trades Council, began the systematic course of conduct complained of. Meanwhile complainants' teamsters, without their advice or knowledge, had withdrawn from the union. Members of the union followed complainants' teamsters along the streets, howling at them, and using aggressive, abusive, and filthy language. They followed them to their destination, and there threatened to boycott the customers of Beck & Sons. They intercepted upon the streets those who were going to the mill with their teams. Defendant Innis boasted that he had turned 15 customers away in one day. Violence was threatened by Delegate Innis and others. Some of them even went into the barn of the complainants, and endeavored, by abusive and threatening language, to drive the teamsters away from their work. Their conduct and threats were in some instances accompanied by language too filthy to print. These facts are unchallenged, the defendants introducing no testimony to deny them or to impeach the character of the witnesses. In this condition of affairs, complainants filed this bill to enjoin these illegal acts, and to save their business from destruction, and themselves from financial ruin.

The defendants have not appealed from the decree against them. No attempt is made by their counsel to defend or justify their action, or to deny the many acts of intimidation, threats, and almost violence; and the learned circuit judge in his opinion said: "I am satisfied these things have been done, and that defendants have combined together for this purpose. I do not intend to justify the publication." Their counsel frankly concede that "it was unlawful for defendants to enter upon the premises of the complainants, or to gather in groups in the street in

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front of complainants' premises, or to use any force or violence for the accomplishment of their purpose." In other words, they concede that defendants were engaged in an "unlawful conspiracy," as defined by Shaw, C. J., in *Com.* v. *Hunt*, 4 Metc. (Mass.) 111, 121 (38 Am. Dec. 346), a definition approved by the Supreme Court of the United States in *Callan* v. *Wilson*, 127 U. S. 540, 555, viz.:

"The general rule of the common law is that it is a criminal and indictable offense for two or more to confederate and combine together, by concerted means, to do that which is unlawful or criminal, to the injury of the public, or portions or classes of the community, or even to the rights of an individual."

The decree sanctioned the distribution of the boycott circulars to customers and the public generally, except in front of the mill premises, and any form of boycott, either to complainants or to their customers, without the actual use of violence, and sanctioned threats to injure, affect, and ruin complainants' business, when unaccompanied by violence or threat of violence. From this part of the decree complainants have appealed.

It is conceded that courts of equity have jurisdiction to restrain conspiracies of this character when irreparable injury is sure to follow. Suits at law would be inadequate, and a multiplicity of suits at law would arise. Complainants were engaged in a lawful business, and carrying it on in a lawful manner. They had done nothing to the defendants, or any of them, either illegal, immoral, or unjust. They were paying wages to their teamsters in fact greater than the union teamsters received, because they made no deductions for certain lost time which the union employers made. The law protects them in the right to employ whom they please, at prices they and their employés can agree upon, and to discharge them at the expiration of their term of service or for violation of their contracts. This right must be maintained, or personal liberty is a sham. So, also, the laborers have

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the right to fix a price upon their labor, and to refuse to work unless that price is obtained. Singly, or in combination, they have this right. They may organize in order to improve their condition and secure better wages. They may use persuasion to induce men to join their organization, or to refuse to work except for an established wage. They may present their cause to the public in newspapers or circulars, in a peaceable way, and with no attempt at coercion. If the effect in such case is ruin to the employer, it is *damnum absque injuria*, for they have only exercised their legal rights. The law does not permit either party to use force, violence, threats of force or violence, intimidation, or coercion. The right to trade and the personal liberty of the employer alone are not involved in this case; the right of the laborer to sell his labor when, to whom, and for what price he chooses is involved.

The five teamsters of the complainants were satisfied with their wages and their treatment. By the action of the defendants, they were thrown out of employment during the summer, except as complainants employed them, when they could, at other work about their mill. The union would not permit Mr. Pfaff to use a horse and wagon which complainants tendered him free of expense, in order that he might provide for himself and family. A boycott of labor as well as of capital is therefore involved in this controversy. The acts and conduct of these defendants are not those of freedom, but of tyranny.

Let us look at the correlative of what these defendants did. If employés have the right to combine to fix their wage rate,—and this is conceded,—employers have the like right to combine to fix a rate they are willing to pay. The law is the same for both, and is alike open to both. If the employers of Detroit had combined in secret organization, established a rate, and agreed to boycott, in the manner these defendants boycotted complainants, any employer and his laborers who would pay more than the price the combination had agreed to, and had carried the

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conspiracy out as was done here, would these defendants consider that just and lawful conduct? Neither courts of equity nor of law would turn such employer and employés away from its temple of justice without a remedy.

It requires no argument to show that in this case, both in reason and authority, actions at law would be utterly inadequate. The course pursued by these defendants, if unchecked, would soon ruin the complainants' business, and bring upon them financial ruin. The defendants and their associates well knew this, and undoubtedly hoped to force complainants to abdicate their legal rights, and to permit defendants to dictate whom complainants should employ, the price they should pay, and the reasons for discharging their employés. While some writers have doubted the remedy by injunction, it is now settled beyond dispute. *Thomas* v. *Railway Co.*, 62 Fed. 803; *Springhead Spinning Co.* v. *Riley*, L. R. 6 Eq. Cas. 551; *Vegelahn* v. *Guntner*, 167 Mass. 92 (35 L. R. A. 722, 57 Am. St. Rep. 443); *Davis* v. *Zimmerman*, 91 Hun, 489; *Gilbert* v. *Mickle*, 4 Sandf. Ch. 357; *U. S.* v. *Elliott*, 64 Fed. 27; *Hopkins* v. *Oxley Stave Co.*, 28 C. C. A. 99, 83 Fed. 912; *Toledo, etc., R. Co.* v. *Pennsylvania Co.*, 54 Fed. 730 (19 L. R. A. 387); *Sherry* v. *Perkins*, 147 Mass. 212 (9 Am. St. Rep. 689); *Hamilton-Brown Shoe Co.* v. *Saxey*, 131 Mo. 212 (52 Am. St. Rep. 622); *Arthur* v. *Oakes*, 11 C. C. A. 209, 63 Fed. 310 (25 L. R. A. 414). Many more authorities might be cited.

There is a long list of civil and criminal authorities which might also be cited holding such combinations unlawful. Among them are the following: *State* v. *Donaldson*, 32 N. J. Law, 151 (90 Am. Dec. 649); *State* v. *Glidden*, 55 Conn. 46 (3 Am. St. Rep. 23); *Reg.* v. *Bunn*, 12 Cox, Cr. Cas. 316; *Rex* v. *Ferguson*, 2 Starkie, 489; *People* v. *Fisher*, 14 Wend. 9 (28 Am. Dec. 501); *People* v. *Kostka*, 4 N. Y. Cr. R. 429; *Walker* v. *Cronin*, 107 Mass. 555; *Carew* v. *Rutherford*, 106 Mass. 1 (8 Am. Rep. 287); *People* v. *Melvin*, 2 Wheeler, Cr. Cas. 262; *Crump* v. *Com.*, 84 Va. 927 (10 Am. St. Rep. 895);

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State v. *Stewart*, 59 Vt. 273 (59 Am. Rep. 710); *Callan* v. *Wilson*, 127 U. S. 540. For instances of lawful combinations, see *Com.* v. *Hunt*, 4 Metc. (Mass.) 111 (38 Am. Dec. 346); *Master Stevedores' Association* v. *Walsh*, 2 Daly, 1; *Wood* v. *Bowron*, 10 Cox, Cr. Cas. 344; *Mogul Steamship Co.* v. *McGregor*, 23 Q. B. Div. 598; *Allen* v. *Flood*, 23 App. Cas. 1; *Brewster* v. *Miller*, (Ky.) 41 S. W. 301; *Macauley* v. *Tierney*, 19 R. I. 255 (37 L. R. A. 455, 61 Am. St. Rep. 770); *Clemmitt* v. *Watson*, 14 Ind. App. 38.

The law abhors subterfuges. It lays aside the covering, and looks to the actual facts beneath. In the language of Chief Justice Shaw:

"The law is not to be hoodwinked by colorable pretenses; it looks at truth and reality, through whatever disguise it may assume." *Com.* v. *Hunt*, 4 Metc. (Mass.) 111, 129 (38 Am. Dec. 346).

Threats in language are not the only threats recognized by the law. Covert and unspoken threats may be just as effective as spoken threats. So, where banners were displayed in front of one's premises bearing the following inscription: "Lasters are requested to keep away from P. P. Sherry's. Per order L. P. U.,"—it was held unlawful, and the act restrained by injunction. *Sherry* v. *Perkins*, 147 Mass. 212 (9 Am. St. Rep. 689). The court said: "The banner was a standing menace to all who were, or wished to be, in the employment of the plaintiffs, to deter them from entering the plaintiffs' premises." The court held that the display of the banners was part of the scheme unlawfully entered into.

So, when these defendants went, in numbers of from 5 to 25, along the streets, and into the business houses of complainants' customers, distributing these circulars, which contained false statements, as hereinafter shown, and which commenced and closed with the words, "Boycott Jacob Beck & Sons," they intended, in emphatic manner, to convey to the customers of complainants that they would be treated in like manner unless they ceased to trade

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with complainants. The distance that this was done from the mill of the complainants does not detract from its character or harmfulness. It was just as effective and as wrong when done 1,000 feet from the mill as when done 10 feet from it. The act itself, not the distance, determines its character. The circular was false in stating that complainants had violated their agreement or had discharged their union men. They had done neither. It was also false in conveying the impression that complainants were not paying living wages or giving their employés fair treatment. The use of this false circular was one of the potent means to carry out the conspiracy. The defendants by their conduct gave every laborer and customer of complainants their definition of what they understood the term "boycott" to mean. It would be idle to argue that these circulars were not intended as a menace, intimidation, and coercion. They were so used, and were "a standing menace" to every one who wished to work for, or trade with, complainants. They constituted a part of the unlawful scheme, and their circulation should have been enjoined.

To picket complainants' premises in order to intercept their teamsters or persons going there to trade is unlawful. It itself is an act of intimidation, and an unwarrantable interference with the right of free trade. The highways and public streets must be free to all for the purposes of trade, commerce, and labor. The law protects the buyer, the seller, the merchant, the manufacturer, and the laborer in the right to walk the streets unmolested. It is no respecter of persons; and it makes no difference, in effect, whether the picketing is done 10 or 1,000 feet away.

It will not do to say that these pickets are thrown out for the purpose of peaceable argument and persuasion. They are intended to intimidate and coerce. As applied to cases of this character, the lexicographers thus define the word "picket": "A body of men belonging to a trades union sent to watch and annoy men working in a

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shop not belonging to the union, or against which a strike is in progress." Cent. Dict.; Webst. Dict. The word originally had no such meaning. This definition is the result of what has been done under it, and the common application that has been made of it. This is the definition the defendants put upon it in the present case. Possibly the decree is specific enough to include picketing, but we deem it our duty to place it beyond controversy.

The decree permits "boycotting by peaceful means," and the ruin of complainants' business by threats or any means short of violence. If, as some authorities hold, the term "boycott" has no authoritative meaning, then the decree is indefinite, and the defendants have no guide except that they must refrain from actual violence or threats of violence. The authorities do not sustain this proposition. If these defendants had threatened complainants' teamsters that, unless they ceased to work for them and joined the union, they had the power, and would use it, to induce all merchants not to sell them any goods by which they might support themselves and families, and had carried out this threat by issuing boycotting circulars, and notifying merchants personally, by their committees, that they must cease to sell goods to these men, there would have been no act or threat of violence. But would the boycott or conspiracy have been lawful? May these powerful organizations thus trample with impunity upon the right of every citizen to buy and sell his goods or labor as he chooses? This is not a question of competition, but rather an attempt to stifle competition. It is a question of the right to exist. If there be no redress from such wrongs, then the government is impotent indeed. But such a combination is a criminal conspiracy at the common law, and in some States, in order to remove all doubt, is made so by statute.

In *State* v. *Glidden*, *supra*, no act or threat of violence was charged in the indictment or proved upon the trial. The charge was that,—

"If the corporation did not yield to their demands, the defendants and their associates would in like manner

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represent to and threaten all persons dealing with the corporation; and that they could and would so control, boycott, and injure the business customers of such persons, as through fear, and by the to-be threatened and concerted withdrawal of the patronage of the defendants, and by stopping and preventing the patronage of others through threats and intimidations, and by other unlawful means, to compel such customers, though against their will, to cease doing business with the subscribers and others, patrons of the corporation; and that the defendants would not give up or abandon these proceedings to injure the business of the corporation until they had either destroyed said business, and prevented it from being carried on, or until the corporation should comply with their demands."

That case and this are substantially alike. In order to induce complainants to yield, the committee of the Trades Council informed them that they had substantially ruined one man. The decision of the court was unanimous, and in it is the following language:

"If we look at this transaction as it appears on the face of this information, we shall be satisfied that the defendants' purpose was to deprive the Carrington Publishing Company of its liberty to carry on its business in its own way, although in doing so it interfered with no right of the defendants. The motive was a selfish one,—to gain an advantage unjustly, and at the expense of others,—and therefore the act was legally corrupt. As a means of accomplishing the purpose, the parties intended to harm the Carrington Publishing Company, and therefore it was malicious. It seems strange that in this day, and in this free country,—a country in which law interferes so little with the liberty of the individual,—it should be necessary to announce from the bench that every man may carry on his business as he pleases, and may do what he will with his own, so long as he does nothing unlawful, and acts with due regard to the rights of others; and that the occasion for such an announcement should be, not an attempt by government to interfere with the rights of the citizen, nor by the rich and powerful to oppress the poor, but an attempt by a large body of workingmen to control, by means little, if any, better than force, the action of employers. The defendants and their associates said to

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the Carrington Publishing Company: 'You shall discharge the men you have in your employ, and you shall hereafter employ only such men as we shall name. It is true we have no interest in your business, we have no capital invested therein, we are in no wise responsible for its losses or failures, we are not directly benefited by its success, and we do not participate in its profits; yet we have a right to control its management, and compel you to submit to our dictation.' The bare assertion of such a right is startling. The two alleged rights cannot possibly co-exist. One or the other must yield.

"If the defendants have the right which they claim, then all business enterprises are alike subject to their dictation. No one is safe in engaging in business, for no one knows whether his business affairs are to be directed by intelligence or ignorance,—whether law and justice will protect the business, or brute force, regardless of law, will control it; for it must be remembered that the exercise of the power, if conceded, will by no means be confined to the matter of employing help. Upon the same principle, and for the same reasons, the right to determine what business others shall engage in, when and where it shall be carried on, etc., will be demanded, and must be conceded. The principle, if it once obtains a foothold, is aggressive, and is not easily checked. It thrives on what it feeds on, and is insatiate in its demands. More requires more. If a large body of irresponsible men demand and receive power outside of law, over and above law, it is not to be expected that they will be satisfied with a moderate and reasonable use of it. All history proves that abuses and excesses are inevitable. The exercise of irresponsible power by men, like the taste of human blood by tigers, creates an unappeasible appetite for more.

"Business men have a general understanding of their rights under the law, and have some degree of confidence that the government, through its courts, will be able to protect those rights. This confidence is the cornerstone of all business. But if their rights are such only as a secret and irresponsible organization is willing to concede to them, and will receive only such protection as such an organization is willing to give, where is that confidence which is essential to the prosperity of the country?"

The true principle is thus stated:

"It is in the line of competition, and every way just,

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for a laborer to seek an enhancement of his wages, and for an employer to desire to depress them. The end is lawful, and especially in the laborer it is commendable. But when the means devised for this just end is the destruction of competition by men combining to shut others out from the benefits which they claim for themselves, or to violate their agreements, or to commit assault and battery and other breaches of the peace, or to wield the power of numbers for the impoverishment of those who refuse to join or co-operate with them, or to move suddenly and together in a manner to injure the public, or even one person, the conspiracy is a public harm, calling loudly for punishment." 2 Bish. New Cr. Law, § 230, par. 2.

In *Springhead Spinning Co.* v. *Riley, supra*, the publication of placards and advertisements, which was part of a scheme to prevent persons from working, and which did intimidate and prevent them, was, upon demurrer to the bill, enjoined, though no violence was threatened. The vice chancellor said:

"Upon the general question whether this court can interfere to prevent these unlawful proceedings by workmen issuing placards amounting to intimidation, and whether acts of intimidation generally would go to the destruction of property, that will probably have ultimately to be decided at the hearing of this cause. In the meantime I would only make this observation: That by the act of parliament it is recited that all such proceedings are injurious to trade and commerce, and dangerous to the security and personal freedom of individual workmen, as well as the security of the property and persons of the public at large; and if it should turn out that this court has jurisdiction to prevent these misguided and misled workmen from committing these acts of intimidation, which go to the destruction of that property which is the source of their own support and comfort in life, I can only say that it will be one of the most beneficial jurisdictions that this court ever exercised."

In *Casey* v. *Typographical Union*, 45 Fed. 135 (12 L. R. A. 195), the attempt was to compel complainant to unionize his establishment. No violence or threats of violence were used. Otherwise the case is the parallel of this. The court say of it, at page 143:

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"It was an organized conspiracy to force the complainant to yield his right to select his own workmen, and submit himself to the control of the union, and allow it to regulate prices for him, and to determine whom he should employ and whom discharge. In other words, it was and is an organized effort to force printers to come into the union, or be driven from their calling for want of employment, and to make the destruction of the complainant's business the penalty for his refusing to surrender to the union. Whatever moral obligation may have been incurred by complainant by reason of his promises to unionize his office, they were wholly without consideration, and they amount to nothing whatever, in law or in equity. No case has been cited where, upon a proper showing of facts, an unsuccessful appeal has been made to a court of chancery to restrain a boycott. The authorities are all the other way. At common law an agreement to control the will of employers by improper molestation was an illegal conspiracy."

Similar language will be found in other of the cases above cited and in others not cited.

The term "boycott" has been defined by lexicographers and courts. Cent. Dict.; *State* v. *Shelton*, 22 Va. Law J. 329; *Brace* v. *Evans*, 3 Ry. & Corp. Law J. 561; *Toledo, etc., R. Co.* v. *Pennsylvania Co.*, 54 Fed. 738 (19 L. R. A. 387). In *Brace* v. *Evans*, *supra*, the court say: "The word 'boycott' in itself implies a threat." In *Toledo, etc., R. Co.* v. *Pennsylvania Co.*, it is said:

"The word 'boycott' is usually understood as a combination of many to cause a loss to one person by coercing others, against their will, to withhold from him their beneficial business intercourse, through threats that, unless those others do so, the many will cause similar loss to them."

Undoubtedly, this is the common understanding of its meaning.

The law sanctions only peaceful means, which leave every one to the exercise of his own free will. The boycott, condemned by the law, is not alone that accompanied by violence and threats of violence, but that where the means used are threatening in their nature, and intended and

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naturally tend to overcome, by fear of loss of property, the will of others, and compel them to do things which they would not otherwise do. Erle, C. J., speaking of the laborer's rights, says:

"Every person has a right under the law, as between himself and his fellow subjects, to full freedom in disposing of his own labor or his own capital, according to his own will. It follows that every other person is subject to the correlative duty arising therefrom, and is prohibited from any obstruction to the fullest exercise of this right which can be made compatible with the exercise of similar rights by others." Erle, Trades Unions, 12; *Allen* v. *Flood*, 23 App. Cas. 1, 75.

There is nothing upon the record to show, nor is it claimed, that the defendants the Teamsters' Union and the Trades Council are unlawful combinations or organizations. The right of such organizations to exist has always been recognized. Chief Justice Shaw, in 1842, in *Com.* v. *Hunt*, *supra*, recognized them as lawful, and uses this illustration:

"Suppose a class of workmen, impressed with the manifold evils of intemperance, should agree with each other not to work in a shop in which ardent spirit was furnished, or not to work in a shop with any one who used it, or not to work for an employer who should, after notice, employ a journeyman who habitually used it; the consequences might be the same. A workman who should still persist in the use of ardent spirit would find it more difficult to get employment; a master employing such an one might, at times, experience inconvenience in his work, in losing the services of a skillful, but intemperate, workman. Still it seems to us that as the object would be lawful, and the means not unlawful, such an agreement could not be pronounced a criminal conspiracy."

It is urged that courts of equity will not restrain the publication of a libel, and that this boycotting circular is a libel, the publication and circulation of which cannot be enjoined. The same claim was made that courts of equity have no jurisdiction to restrain the commission of a crime. But the answer is, and always has been, that parties can-

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not interpose this defense when the acts are accompanied by threats, express or covert, or intimidation and coercion, and the accomplishment of the purpose will result in irreparable injury to, and the destruction of, property rights. If all there was to this transaction was the publication of a libelous article, the position would be sound. It is only libelous in so far as it is false. Its purpose was not alone to libel complainants' business, but to use it for the purpose of intimidating and preventing the public from trading with the complainants. It called upon them to boycott them. The defendants, by their conduct, gave all the patrons of complainants, and others as well, the meaning they attached to the word "boycott," and they all evidently understood it as the defendants interpreted it by their conduct and acts. It is true that, under our Constitution, no one can be enjoined from publishing a libel. (Const. Mich. art. 4, § 42.) By this provision, every person is entitled to "freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of such right." See *Hamilton-Brown Shoe Co.* v. *Saxey*, 131 Mo. 221 (52 Am. St. Rep. 622).

We are not unmindful of the difficulty often presented to the courts to determine what constitutes an unlawful boycott, and to determine what acts come within the jurisdiction of the courts to enjoin and punish, and what belong to the legislative department to protect the public against. As already shown, injury, or even ruin, to one's business, may result from lawful competition and combination of either labor or capital, and, in such cases, the public are indirectly injuriously affected. In both England and in some of the United States these combinations, which are supposed to injuriously affect the public, have been the subject of legislation, and unlawful combinations have been defined, and punishment thereof provided. The aim of the courts has been, not to introduce into their decisions new principles, but to apply old and well-established ones, for the equal protection of all persons. In *Pasley* v. *Freeman*, 3 Term R. 63, Ashhurst, J., said:

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"Where cases are new in their *principle*, there I admit that it is necessary to have recourse to legislative interposition in order to remedy the grievance; but where the case is only new in the *instance*, and the only question is upon the application of a principle recognized in the law to such new case, it will be just as competent to courts of justice to apply the principle to any case which may arise two centuries hence as it was two centuries ago. If it were not, we ought to blot out of our law books one-fourth part of the cases that are to be found in them."

This rule is recognized in *Arthur* v. *Oakes*, 11 C. C. A. 209, 63 Fed. 310 (25 L. R. A. 414), and by Justice CHAMPLIN in *Burke* v. *Smith*, 69 Mich. 395.

The case of *Allen* v. *Flood*, *supra*, is a forcible illustration of the difficulty, even in judicial minds, to agree. That case was really a contest between two labor unions, — the Shipwrights' Provident Union and a society of boilermakers and ironworkers. The latter denied the right of shipwrights to do ironwork upon vessels. The Glengall Company, for which both parties were at work, had a contract to repair a ship. Forty ironworkers and the plaintiffs, Flood and Taylor, shipwrights, were at work on the job. The ironworkers learned that plaintiffs had just before worked on a similar job, where they did ironwork, and called in Allen, their district delegate. Allen informed the agents of the Glengall Company that the ironworkers would quit work unless they discharged plaintiffs. The company discharged plaintiffs, but in doing so violated no contract, as they had the right to discharge them at any time. They, however, had an expectancy of continued employment, and but for the statement of Allen would have been retained. Flood and Taylor sued Allen in tort. A recovery was had in the trial court. The case was taken to the court of appeals, and sustained by a unanimous decision. It was then appealed to the house of lords, and the opinions of 8 judges were presented, 6 of whom were for sustaining the judgment. Of the 9 lords, 6 were against the judgment and 3 for it. Of the 21 judges and lords, 13 held the action of Allen to be

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an unlawful interference with the freedom of labor, and actionable. This case, therefore, to other courts than those of England, is mainly instructive in the learned and exhaustive opinions rendered. The majority of the lords appear to have based their opinion upon the fact that there was no conspiracy; that the Glengall Company had violated no contract in discharging plaintiffs; and that the ironworkers had the right to leave, and to threaten to leave, their employment for any reason whatever.

The decree must be modified so as to enjoin picketing, the distribution of the boycotting circular, and all acts of intimidation and coercion.

The importance of this case, and the fact that no such case has before been presented to this court, constitute our excuse for the unusual length of the opinion.

The other Justices concurred.

NASH v. H. R. GLADDING CO.

1. CONTRACT OF EMPLOYMENT—BREACH—EVIDENCE—WILLINGNESS TO PERFORM.

   Testimony by an employé, as to his willingness to continue his services, is immaterial in an action to recover wages for the balance of a contract period in which he performed no work, where it is not claimed that he expressed such willingness to the employer.

2. SAME—SALE OF EMPLOYER'S BUSINESS.

   An employé is not justified in assuming that his contract of employment has been abrogated from the fact that the stock and business of his employer have been sold on execution.

Error to Wayne; Lillibridge, J. Submitted October 21, 1898. Decided November 15, 1898.

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Assumpsit by George R. Nash, assignee of Howard R. Gladding, against the H. R. Gladding Company, for the breach of a contract of employment. From a judgment for defendant on verdict directed by the court, plaintiff brings error. Affirmed.

Bacon & Palmer, for appellant.

Jasper C. Gates, for appellee.

LONG, J. This case was commenced in justice's court, where plaintiff recovered a judgment for $350. Defendant appealed to the circuit court, where, on a trial before a jury, the court directed verdict in favor of defendant. The plaintiff is the assignee of a claim which Howard R. Gladding made against the defendant under the following contract:

"This agreement, made this 30th day of March, 1893, between Howard R. Gladding, of the first part, and H. R. Gladding Company, of the second part, witnesseth: That the said Howard R. Gladding agrees faithfully and diligently to work for the said H. R. Gladding Company as its manager at Detroit, Wayne county, Michigan, for a period of one year from the date hereof, for the sum of $15 per week, and the further annual payment of a sum equivalent to the dividends which would have accrued on 50 shares of stock in the said corporation for one year from the date hereof, said sum to be the same as the annually declared dividends. In consideration of which service so to be performed, the said H. R. Gladding Company agrees to pay the said Howard R. Gladding the said sum of $15 per week, and the annual payment of a sum equivalent to the dividend which would have accrued on 50 shares of its stock.

"In witness whereof, said parties have hereunto set their hands and seals, the day and year first above written.

"H. R. GLADDING. [L. S.]
"H. R. GLADDING COMPANY, [L. S.]
"By STEPHEN A. PRATT, Pres."

Upon the execution of this contract, Howard R. Gladding entered upon the performance of his duties as man-

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ager for the defendant, and continued in that capacity until October 17, 1893, at which date the stock and business of the company were sold by the sheriff, and purchased by Stephen Pratt, the father of the president of the Gladding Company; and upon such sale defendant ceased to do business. Gladding did no work for the company after the sale, and received no further pay. After the expiration of the year, he assigned his demand to the plaintiff, who now seeks to recover the salary for the balance of the year from October 17, 1893.

It was the contention of the defendant on the trial that the plaintiff had made no case to go to the jury. The court below instructed the jury:

"There is no evidence in the case that this plaintiff [meaning plaintiff's assignor] was discharged by the defendant from his employment. The only testimony on that point is that on October 17th the property of the defendant was sold by the sheriff, and that this plaintiff then disappeared from his place of business, and did not return to continue or offer his services, and that, although he frequently met the president of the company, he never expressed to him his willingness to perform the services under the contract, or asked pay from him for services under the contract. There is no evidence in this case that the plaintiff was discharged by defendant company. That being a material point for the plaintiff to establish. I charge you he cannot recover under the evidence."

We think this charge was proper, under the testimony given by the plaintiff's assignor. He was produced as a witness for the plaintiff, and gave no testimony that he was discharged by the defendant company. It appeared that the accounts kept by him were in a somewhat confused state, the ledger balances being many times forced by the charge of the balances to profit and loss. The president of the company, after October 17, 1893, had several talks with Mr. Gladding about the accounts; but at no time does it appear from Gladding's testimony that he offered to continue his services to the company, nor does it appear that the company was not in a financial

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condition to continue the employment and pay him for his services. It would seem that he quit of his own volition, and never offered to continue his services. Three years thereafter he assigned this claim, and then for the first time a demand was made for pay for the time which he had never expended for the company.

In *Collins* v. *Hazelton*, 65 Mich. 220, it appeared that defendant's foreman had told the plaintiff that defendant did not want him to work any longer. The foreman had no authority to discharge the plaintiff. Plaintiff had been paid monthly. He did not claim his pay at the usual time, and said nothing to defendant about it. In reversing the judgment in favor of the plaintiff, it was said:

"He was bound to show actual authority from Hazelton for his discharge, or actual knowledge and approval of his discharge. * * * He was also bound to see that Hazelton had knowledge that he refused to acquiesce in his discharge, and that he proposed to hold himself ready at all times to resume his labor. * * * A person who proposes to put his employer in the wrong must take sufficient pains to prevent any reasonable misapprehension of his pretentions."

Here the case is much stronger. The plaintiff does not pretend to have received, and made no offer to show, a discharge of Gladding, or that he ever offered to resume his work for the company after October 17th. The fact that the property of the company was levied upon and sold by the sheriff did not justify Mr. Gladding in treating the contract as abrogated, or in assuming, under the facts shown here, that the defendant could not carry out its contract, as there was no showing that the company was insolvent, or that it might not have been able to procure him a place with Mr. Pratt, who became the purchaser of the property, and thereafter carried on the business. Apparently, he quit the business of his own accord, and never after that inquired whether his services were needed. It is true that plaintiff's counsel, on the examination of Gladding as a witness on the trial, asked

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him to state whether or not he was willing to carry out the contract for the balance of that period, and the court ruled it out. But this was not an inquiry as to his tender of services, and his willingness to carry it out would not aid the plaintiff unless he expressed that willingness to the defendant. Mr. Gladding's willingness to perform the services should have been expressed to the defendant, and no claim is made that it was.

The judgment must be affirmed.

The other Justices concurred.

VANOSDALL v. HAMILTON.

1. EXECUTION—LEVY—POSSESSION OF OFFICER—CUSTODIAN.
   An officer who has levied upon a stock of goods may preserve his possession of the same by placing them in charge of a keeper.

2. SAME—LEVY IN EVENING—POSTPONEMENT OF INVENTORY—STORE OCCUPIED AS DWELLING.
   Where a levy on a stock of goods is made at 8:30 o'clock p. m., when the owner is not present, the officer may take possession of the entire stock, and wait until the next day to make his inventory and to allow the owner to make his selection of exemptions, even though a part of the store building is occupied by the owner as a dwelling.

3. SAME—VALIDITY OF LEVY.
   A sheriff, acting under an execution, went to the store of the judgment debtor at 8:30 o'clock in the evening of the day on which the execution was issued, and notified the clerk of the fact and purpose of a levy upon the goods, and indorsed the levy upon the execution. On account of the lateness of the hour, he placed the stock in charge of a keeper, and postponed further proceedings to enforce the levy until the following morning. In the meantime the custodian was forcibly ejected by the owner. *Held*, that the levy was valid.

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4. SAME—WAIVER OF LEVY—QUESTION FOR JURY.

Upon the return of the officer the next day, he found the stock in the possession of a creditor, who had been given a chattel mortgage the previous evening. Subsequently the officer brought trover for the goods, claiming that he was denied possession by the mortgagee, and that all his efforts to make an appraisal under the execution were thwarted by the debtor's attorney. The mortgagee denied having taken possession of the goods as against the levy, and claimed that he merely took an inventory under a written agreement with the sheriff that the noninterference of the officer should not "waive any rights said sheriff now has to claim a valid levy on said stock of goods;" that he kept possession for no other purpose; but that the sheriff, after such agreement, made no further effort to take possession or perfect the levy. *Held*, that the question whether there was a waiver of the levy was for the jury.

5. SAME—TROVER—DISPOSSESSION OF OFFICER.

Where, after the levy of an execution, the defendant takes forcible possession from the custodian, the levying officer may bring trover.

Error to Eaton; Smith, J. Submitted October 6, 1898. Decided November 15, 1898.

Trover by John Vanosdall, deputy sheriff of Eaton county, against Herbert H. Hamilton, the Michigan State Bank of Eaton Rapids, and Thomas M. Sloan. From a judgment for defendants on verdict directed by the court, plaintiff brings error. Reversed.

J. H. Cole (*Geer & Williams*, of counsel), for appellant.

John M. Corbin (*Huggett & Smith*, of counsel), for appellees.

LONG, J. This action of trover was brought by the plaintiff, a deputy sheriff of Eaton county. The court below directed verdict in favor of defendants.

It appears that on April 28, 1897, one Reuben Wood recovered a judgment for $288.06 and $10 costs of suit against

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defendant Sloan in justice's court. Execution was issued on the same day, a proper showing having been made therefor; and plaintiff claims that, the execution being placed in his hands, he made a levy immediately upon a stock of goods, furniture, and fixtures belonging to defendant Sloan, situated in his store at Dimondale, that county. Defendant Sloan was not present when the levy was made, and the execution was not read to him until the next day; but plaintiff claims that the clerk of defendant Sloan was in charge of the store at the time, and was notified that a levy was being made, and for what purpose; that, on account of the lateness of the hour, plaintiff placed the goods levied upon in the custody of one Phinney, with the intention of taking further proceedings to enforce the levy on the following morning; that on the same evening, and a short time after Mr. Phinney had been placed in charge of the goods levied upon, he was forcibly ejected from the store building by defendant Sloan, and, when plaintiff went to the store on the following morning, he found defendant Hamilton in possession of the goods, claiming to be acting in behalf of the Michigan State Bank of Eaton Rapids; that Hamilton was cashier of that bank, and that there was with him on that occasion the attorney of the bank; that a demand was made by plaintiff and by the execution creditor, upon all the parties there, for the possession of the goods. What occurred on the next day after the claimed levy is somewhat in dispute. The defendants claim that, on the evening of the alleged levy, defendant Sloan gave a chattel mortgage to defendant Hamilton, as trustee for several creditors, and Mr. Hamilton went to the store to inventory the stock; that he made no pretense that he was there to take possession of the goods as against the levy, but, finding no one in possession but defendant Sloan, who had given the mortgage, he proceeded to make the inventory; that he took and kept no possession except for that purpose; that, while the inventory was being taken, an agreement was entered into between the parties, as follows:

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"I hereby agree, as attorney for Herbert H. Hamilton, who claims to be in possession of the stock of goods of Thomas M. Sloan under a chattel mortgage, and is inventorying said stock of goods; also Mr. Clark C. Wood, as attorney for Reuben Wood, as judgment creditor, claims that a valid levy has been made on said goods and merchandise prior to the execution of said chattel mortgage, which is disputed by the said Herbert H. Hamilton; that the fact that the sheriff does not interfere with the possession of said goods, or hinder the said Herbert H. Hamilton from taking said inventory until next Tuesday, that such action shall not waive any rights that said sheriff now has to claim a valid levy on said stock of goods at this date."

This was signed by defendant Hamilton by his attorney, and by defendant Sloan.

It is claimed that this agreement shows that the parties understood that defendant Hamilton was there simply taking an inventory of the stock, upon which he had a mortgage. It is also claimed that the plaintiff did not do anything that was intended as a demand; and that the testimony shows that the plaintiff and the execution creditor did not then insist on the possession of the goods under the levy, and, after making the agreement set forth, made no further effort to take possession or to perfect the levy. It is therefore claimed that this amounted to an abandonment of the levy, though it might have been a good levy at the time. It is also claimed by the defendants that the levy was invalid for two reasons:

1. That the sheriff had no right to take possession of this whole stock, which was worth from $2,500 to $3,000, and keep defendant Sloan out of the store, which was used in part as his dwelling house, and put a stranger in possession of his household, in order to collect this execution out of the stock.

2. That the defendants did not obstruct the levy of the plaintiff at that time, and that they did not thereafter assume such control of the property as to defeat the plaintiff's going on with the levy.

The court below was of the opinion that the levy had

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been abandoned by the plaintiff, and from the remarks of the court it is evident that the verdict was directed for defendants upon that ground; and counsel for defendants now insist that the plaintiff's own testimony shows that he did abandon it. On the other hand, it is the contention of counsel for plaintiff that when a demand was made, on the day following the levy, for the possession of the goods, it was refused, and defendant Hamilton stated that he did not recognize the validity of the levy; that the plaintiff then made an attempt to take an inventory, but was unable to secure appraisers on account of the tactics pursued by the attorney of defendant Sloan; that, being unable to secure appraisers by reason of such opposition, the agreement was entered into as above set forth, which agreement was not to be construed as a waiver of any of plaintiff's rights under the levy. The plaintiff introduced testimony tending to show that Mr. Wood, acting as attorney for the plaintiff, made the demand for the goods; that he ordered the defendants out of the store, and was going to make an inventory, when the attorney for defendant Sloan told the appraisers that they would be liable to various kinds of actions that could be brought against them, and that they had better keep out of the trouble, and upon this the appraisers refused to act; that four or five different men were procured as appraisers, and all refused to act after being told by defendant Sloan's attorney that they would have trouble if they acted in that capacity; that defendant Hamilton then refused to give up the goods, and said he proposed to keep possession. This testimony was in dispute, the defendants contending that their only claim was the right to take an inventory, and not to hold the goods against the levy. Under these circumstances the court was, we think, in error in directing the verdict for defendants.

The levy was made at 8:30 o'clock on the evening of April 28, 1897; the day on which the execution was issued, and the levy was indorsed by the officer on the execution. He took possession of the stock, put it in charge of a cus-

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todian, whom defendant Sloan turned out of possession, and at once gave the chattel mortgage to defendant Hamilton, as trustee. The plaintiff, as shown by his testimony, did all in his power to retain possession after the levy was made. He was in possession by the custodian, and the custodian was surreptitiously ejected from the premises by the defendant Sloan. Under these circumstances the levy was a valid one. *Roth* v. *Wells*, 29 N. Y. 471; *Beekman* v. *Lansing*, 3 Wend. 446; *Quackenbush* v. *Henry*, 42 Mich. 75. The officer very properly put a keeper in charge, and this was a sufficient precaution to preserve his possession under the levy. *Stilson* v. *Gibbs*, 46 Mich. 215.

The fact that this store was adjoining the dwelling house could not make the levy invalid. The goods were subject to levy. It was the duty of the officer to make it. It is true that he levied upon a large quantity of goods, but the circumstances under which it was made, and the time of day, we think, warranted the officer in taking possession of the stock until the next morning, when he could make his inventory, and defendant Sloan his selection of exemptions. The officer could not be expected to determine at a glance the exact quantity of goods there. He was not permitted to hold possession, as he claims. Whether there was a waiver of the levy was a question of fact for the determination of the jury. The court was in error in determining it as a question of law. The jury should have been instructed that the levy was valid, and that, if defendants refused to surrender possession on the morning after the levy, the plaintiff's right of action was complete, unless he abandoned his levy by consent of the judgment creditor.

Some claim is made that the plaintiff could not maintain trover under the facts shown in this case. If there was no waiver of plaintiff's rights under the levy, we think it clear that the action was properly brought. *Witherspoon* v. *Clegg*, 42 Mich. 484.

The judgment must be reversed, and a new trial awarded.

The other Justices concurred.

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PEOPLE, *for use of* HOLMES, *v.* SHEEHAN.

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1. SALE—PASSING OF TITLE—DELIVERY.
   Where one person has agreed to sell and another to buy a specific and designated article, the law, in the absence of any manifestation of a contrary intention, presumes a sale to have been effected; delivery not being essential to the passing of title as between the parties and their privies.

2. SAME—CONSTRUCTION OF CONTRACT.
   Under an agreement whereby S., a contractor, was to select curbstone at H.'s yard, "and when the curbstone was thus picked out, and delivered to S., it should belong to S., and H. would have nothing more to do with it," title passed when the stone was selected at the yard, although H. was to transport it when requested.

3. SAME—DELIVERY ON SUNDAY—EFFECT ON CONTRACT.
   The right to recover the purchase price of goods sold upon a week-day is not affected by the fact that delivery was made on Sunday.

4. PAVING CONTRACT—CONTRACTOR'S BOND—LIABILITY OF SURETIES.
   Sureties upon the bond of a paving contractor are not liable for material purchased for the improvement, but subsequently rejected, and sold to other parties.

5. SAME—ACTIONS—PARTIES DEFENDANT.
   Dealers in paving materials, who have supplied contractors with stone used for distinct improvements, in respect to which separate bonds were given, cannot, in an action to recover a balance due, join all the sureties upon the different bonds, but should bring separate actions for the balance due on each improvement against those liable therefor.

6. SAME—APPLICATION OF PAYMENTS.
   Payments made upon an account for materials furnished to a paving contractor for use in several improvements, in the absence of any application by the parties, will be applied to the charges in the order of their date.

Error to Wayne; Carpenter, J. Submitted October 18, 1898. Decided November 15, 1898.

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Assumpsit by the people of the State of Michigan, for the use and benefit of Frank B. Holmes and Albert R. Strachan, copartners, against Thomas P. Sheehan, Robert C. Sheehan, John Archer, and John C. McDonald, upon a statutory bond. From a judgment for plaintiffs for less than the amount claimed, both parties bring error. Modified.

Warner, Codd & Warner, for plaintiffs.

George H. Prentis, for defendants.

HOOKER, J. The findings of fact filed by the circuit judge state that the defendants Sheehan contracted with the city of Detroit to furnish materials and repave three streets, one of which was Randolph street. The other defendants were sureties upon the statutory bond given upon the Randolph-street contract according to the provisions of Act No. 94 of the Public Acts of 1883, as amended by Act No. 45 of the Public Acts of 1885. The plaintiffs furnished materials, viz., curbstone, for all of these jobs, amounting in the aggregate to $1,182.18. Payments were made amounting to $674.83, leaving a balance of $507.35. All of the stone was charged upon one account, and the payments were so credited, the last credit being August 7th. On or about August 5th the plaintiffs had an interview with the Sheehans, in which they said that, owing to what they considered an unfair rejection of stone, they would furnish no more, unless the Sheehans would select such material at plaintiffs' yard, and when thus picked out, and delivered to Sheehan & Co., it should belong to them, and the plaintiffs would have nothing more to do with it. This was agreed to, and upon a secular day the Sheehans examined at the yard 629 feet 8 inches of curb, which was delivered to them upon Randolph street. The judge found that this became the property of the Sheehans, whether used or not, and that, of this quantity of stone, 334 feet at 58 cents per foot, worth $193.72, was delivered on Randolph street,

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at the request of the Sheehans, upon Sunday, August 8, 1897. Of this quantity delivered upon Sunday, the Sheehans sold to other parties an amount worth $34.39; it being curb that was rejected by the inspectors. It is inferred that the remainder was used upon the street. The learned circuit judge found, as conclusions of law, that the defendants Archer and McDonald are not liable for the curb delivered on Sunday, amounting to $193.72, nor for the curb not used on Randolph street, amounting to $30.42; also, that the payments should be applied to the charges in the order of time; and he rendered judgment for the plaintiffs for $283.16, with interest at 6 per cent. from September 1, 1897. Exceptions were taken to the several findings of law. Both parties appealed.

Counsel for the plaintiffs contend that the selection of the stone passed the title from them to the Sheehans. If this is so, their liability is not affected by the fact that the stone was drawn Sunday. The finding shows that the material in question was furnished under the agreement of August 5th, which grew out of a refusal on their part to furnish any more material unless the defendants Sheehan would select it at the yard. It is a general rule that, when one has agreed to sell and the other to buy a specific and designated article, the title passes to the purchaser at once, unless the terms of the contract indicate the intention to have been otherwise, and delivery is not essential to the passing of title as between the parties and their privies. This rule is supported by innumerable cases, a long list of which will be found in 21 Am. & Eng. Enc. Law, 476, note 1,—among them, three of our own cases, viz.: *Davis* v. *Ransom*, 4 Mich. 238; *Whitcomb* v. *Whitney*, 24 Mich. 486; *Byles* v. *Colier*, 54 Mich. 1. See, also, *Lingham* v. *Eggleston*, 27 Mich. 324; *Blodgett* v. *Hovey*, 91 Mich. 574; *Kuppenheimer* v. *Wertheimer*, 107 Mich. 79 (61 Am. St. Rep. 317).

Where there is no manifestation of intention, the law presumes a sale, and the immediate transfer of title, if the specific thing is agreed on, and it is ready for immediate

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delivery. See 21 Am. & Eng. Enc. Law, 482, and cases cited in note 1; *Lingham* v. *Eggleston*, *supra; Kuppenheimer* v. *Wertheimer*, *supra*. This presumption will be overcome if a different intention can be deduced from the contract, and in this case counsel asserts that the finding shows a different intention. The language is, "Sheehan & Co. should select the material at their yard, and when the curbstone was thus picked out, and delivered to Sheehan & Co., it should belong to Sheehan & Co.. and Holmes, Strachan & Co. would have nothing more to do with it." Were the last clause of the sentence omitted, it would be plain that the parties understood that the title was to pass upon selection, which is coupled with delivery in a manner indicating such intent. But counsel argues that the word "delivery" cannot have been used in that sense, because the language implies that after delivery the plaintiffs were not to have anything more to do with the stone, which would be inconsistent with an agreement that they should deliver it on Randolph street. Were we disposed to be technical, we might say that there is nothing in this contract, as stated in the finding, to indicate an obligation upon the part of the plaintiffs to transport the stone; but it appears that they did so, and we therefore assume that it was understood that they should transport it when requested. The question is not free from difficulty. As several of the cases cited hold, the mere agreement to do this would not prevent the title from passing; and we think a fair construction of the sentence quoted to be that after selection the title should pass to the Sheehans, who would take it subject to the vicissitudes of inspection, with which the plaintiffs should have nothing to do. Taking this view of the case, the Sheehans became liable for the purchase price when the stone was selected, as the sale was then complete; and this liability was not affected by the subsequent transportation of the stone upon Sunday, to do which was no part of the contract of sale. This conclusion necessitates a reversal of the case, but we will consider the other questions raised.

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We are of the opinion that the bondsmen cannot be held liable for material which, though purchased for this job on Randolph street, was rejected, and sold to other parties.

Counsel for defendants also alleges error upon the application of payments, but cites no authority which prevents the application of payments by the parties to the contract under the usual rule, or, if they fail to specify how all payments shall be applied, justifies any other rule than that followed by the learned circuit judge.

A further point is made, viz., that this was a running account between the Sheehans and the plaintiffs, and that it could not be split for the purpose of bringing separate actions. We understand counsel to claim that the bondsmen upon all three contracts should have been joined in one action for the entire balance of the account. Such an action could not have been maintained, as there was no joint liability between the sureties upon different bonds. This is not an action upon the contract for stone, but is based upon the bond, and is authorized by the statute.

The finding shows that the curb furnished for Randolph street amounted to $853.01, upon which there was unpaid the sum of $507.35. From this amount the rejected curb, amounting to $64.81, should be deducted, leaving a balance of $442.54, for which sum, with interest at 6 per cent. from the 1st day of September, 1897, judgment will be entered in this court, with costs to the plaintiffs.

The other Justices concurred.

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ROBERTS *v.* DENIO.

TAXES—SEIZURE OF PERSONALTY—REPLEVIN.

Plaintiff, in replevin for property taken under a tax warrant to satisfy a tax levied in pursuance of a law of the State, cannot go behind the warrant and show the invalidity of the tax.

Error to Sanilac; Beach, J. Submitted October 19, 1898. Decided November 15, 1898.

Replevin by William Roberts against George Denio. From a judgment for defendant, plaintiff brings error. Affirmed.

Gates & Rapley, for appellant.

W. H. Burgess and *William Dawson*, for appellee.

GRANT, C. J. Defendant was the treasurer of the village of Sanilac Center for the year 1897, and had a warrant for the collection of taxes, valid upon its face. He levied upon personal property to satisfy a tax assessed against the plaintiff. Plaintiff brought this action of replevin, claiming the right to go behind the warrant and show the invalidity of the tax. The court entered judgment for the defendant. The suit is within the expressed prohibition of the statute, and cannot be maintained. 2 How. Stat. § 8318; *Boyce* v. *Peterson*, 84 Mich. 490; *Curtiss* v. *Witt*, 110 Mich. 131. This case is not within the few which have sustained the action of replevin when the tax was not levied in pursuance of any law of this State. These cases will be found cited, and the distinction shown, in *Curtiss* v. *Witt*.

Judgment affirmed.

The other Justices concurred.

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NEWMAN v. OLNEY.

ASSUMPSIT—CONVERSION BY BAILEE—WAIVER OF TORT.

One who leaves property with a bailee, who converts it to his own use, may waive the tort, and sue in *assumpsit* to recover its value.

Error to Calhoun; Smith, J. Submitted October 20, 1898. Decided November 15, 1898.

Assumpsit by William Newman against John B. Olney to recover the value of property converted by defendant. From a judgment for plaintiff, defendant brings error. Affirmed.

M. H. Nichols, for appellant.

Le Bar Tompkins, for appellee.

MOORE, J. Plaintiff sued defendant in justice's court, and recovered a judgment. His declaration was upon all the common counts in *assumpsit*. The case was appealed to the circuit court, where, after a trial by a jury, plaintiff recovered a judgment of five dollars. Defendant has brought the case here by writ of error.

It is the claim of plaintiff that he sold his farm to defendant for $400. He claims he left upon the land eight or ten cords of cord-wood and about a thousand feet of elm logs, upon an agreement that Mr. Olney might have the logs if he would allow Mr. Newman to leave the wood until the following winter. Mr. Olney drew the wood to his house, where it was at the time of the trial, and drew the logs to the mill. It was the claim of the defendant that he not only bought and paid for the land, but that he bought and paid for the logs and wood the sum of five dollars. The trial judge, at the request of the

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defendant, submitted four special questions to the jury, which they answered, and they returned a general verdict of five dollars for the plaintiff.

It is claimed by defendant the special findings are inconsistent with the general verdict, and that the general verdict should be set aside. A motion for a new trial was made for that reason. In overruling the motion, the circuit judge found that the special findings were not inconsistent with the general verdict, and that the jury were not misled as to the issues of fact in the case. The trial judge was correct in his conclusion.

It is urged that, as the defendant still has the wood in his possession, the action of *assumpsit* cannot be maintained; citing *Watson* v. *Stever*, 25 Mich. 386; *Tolan* v. *Hodgeboom*, 38 Mich. 624. The first of these cases is not in point, and the second case seems to be based upon the first one. In the case at bar it is admitted by defendant that plaintiff was the owner of the wood, but it is claimed that he sold it to defendant. It was the claim of the plaintiff, not only that he was the owner of the wood, but that he continued to be the owner of it at the time defendant converted it. His claim is, it was to be left with defendant, in consideration of plaintiff's letting defendant have the logs, until the next winter. The jury found against defendant's claim, and must have found plaintiff's version of the transaction to be true. According to both versions, it came into possession of the defendant by reason of a contract made between them. They do not agree as to what the contract was, but they both agree a contract was made. The plaintiff waived the tort. The possession of the property was obtained under contract between the parties, and the refusal to surrender the property amounted to a conversion, for which the tort could be waived and *assumpsit* brought. *McLaughlin* v. *Salley*, 46 Mich. 219; *Coe* v. *Wager*, 42 Mich. 49; *Loomis* v. *O'Neal*, 73 Mich. 582; *Aldine Manfg. Co.* v. *Barnard*, 84 Mich. 632. If the version given by the plaintiff is the true one, the defendant was the bailee for the wood. It was his

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duty to deliver it to the plaintiff when he called for it. In such a case the plaintiff could sue in trover for the conversion, or, waiving the tort, might sue in *assumpsit*, and recover its value. *Tuttle* v. *Campbell*, 74 Mich. 652 (16 Am. St. Rep. 652).

Judgment is affirmed, with costs.

The other Justices concurred.

DUNN v. DETROIT SAVINGS BANK.

1. GARNISHMENT—DISCLOSURE—AMENDMENT.
   The court may, at any time before judgment, permit a garnishee to amend his disclosure, upon due notice to the opposite party.

2. SAME—ESTOPPEL.
   A garnishee bank which, after an alleged defective service of the writ, paid out the deposit of the principal defendant on his outstanding checks, and, upon a subsequent service, filed a disclosure denying liability, is not estopped thereby from showing the exact condition of things at the time of the alleged defective service,—as that the fund was subject to the prior claim of a mortgagee.

Error to Wayne; Carpenter, J. Submitted October 20, 1898. Decided November 15, 1898.

Garnishment proceedings by Edward J. Dunn against the Detroit Savings Bank, as garnishee of Thomas Swan and others. The Union Trust Company intervened as claimant of the fund. From a judgment for claimant, plaintiff brings error. Affirmed.

Statement of case taken substantially from brief of claimant: Plaintiff, Dunn, holds a judgment against the principal defendant, Swan, rendered in 1894, and on June

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1, 1897, took out a writ of garnishment, based on the judgment, against the Detroit Savings Bank. At the time the writ was issued, defendant Swan had $900 on deposit in the said bank, the proceeds of sales of his stock in business. The sheriff, in making service of the writ, by mistake served a copy of the affidavit of garnishment, instead of a copy of the writ itself. A few hours later, a new and proper service of the writ was had; but in the meantime the bank paid the money to Swan on his checks then outstanding, and its disclosure set up no liability. An examination of the garnishee was demanded, and the issue reached the trial stage February 9, 1898. It was agreed that the court might dispose of the case without a jury, and the court evidently took the case into consideration.

The claimant, Union Trust Company, held a chattel mortgage, made in 1893, and kept in force by proper renewals, on all defendant Swan's stock, present and future, proceeds of sales, etc., and, upon learning of the garnishment proceedings, claimed any amount for which the bank might be held in the proceedings, under its mortgage. As the bank had not, in its disclosure, set up the mortgagee's claim, the court, February 16th, allowed the disclosure to be amended so as to permit intervention under the statute, and, February 21st, after due notice to plaintiff, made an order interpleading the trust company as claimant. The court also found that the service of the writ on the bank was a good one, and directed a verdict against it in favor of the plaintiff, subject to the rights of the claimant, to be established in a trial between plaintiff and claimant. This latter issue was tried May 17th, and, all the facts being undisputed, the court held that under the decision of this court in the case of *Dunn* v. *Michigan Club*, 115 Mich. 409, where this same mortgage was construed, claimant was entitled to the fund, and a verdict was rendered and judgment entered in favor of the claimant. From this judgment, plaintiff has taken a writ of error.

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William B. Jackson, for appellant.

Russel & Campbell, for appellee Union Trust Co.

GRANT, C. J. (*after stating the facts*). 1. The amendment was allowable. 2 How. Stat. § 7631; *Newell* v. *Blair*, 7 Mich. 103; *Drake* v. *Railway Co.*, 69 Mich. 168 (13 Am. St. Rep. 382); *Rock* v. *Collins*, 99 Wis. 630. It is true that the issues had been submitted to the court on February 9th, but it was within the power of the court to open the case and allow an amendment at any time before judgment, upon due notice to the opposite party.

2. The bank was not estopped by its first disclosure that, at the time of the service of the writ, it had no money in its hands belonging to Swan. It did not have at the time of the actual service. The court held that the exhibition to the cashier of the original writ, and the service of a copy of the affidavit, instead of a copy of the writ, constituted a good service. The court was correct in permitting the garnishee to show the exact condition of things at the time of the alleged defective service.

Judgment affirmed.

The other Justices concurred.

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YOUNGS *v.* AUDITOR GENERAL.

TAX SALES—REDEMPTION—CERTIFICATE OF ERROR.

Where a city council, assuming the invalidity of a sidewalk tax for a certain year, ordered the tax reassessed in the following year, and the land was sold for the taxes of both years, and the owner, in due season, sought to redeem from the second sale, the auditor general was justified in canceling the former sale, and issuing a certificate of error thereon, under section 98, subd. 2, of the tax law of 1893, authorizing such action in cases where the tax was paid "within the time limited by law for the payment or redemption thereof." HOOKER, J., and GRANT, C. J., dissenting.

Certiorari by Clark W. Youngs to review the action of Roscoe D. Dix, auditor general, in issuing a certificate of error. Submitted June 10, 1898. Writ quashed November 15, 1898.

W. S. Hill, for petitioner.

Henry E. Chase, Deputy Attorney General (*E. C. Chapin*, of counsel), for respondent.

HOOKER, J. Hinds was owner of city lots in Stanton. In 1893 the city authorities built a sidewalk adjacent to these lots, and a special tax was spread therefor against the lots. The tax not being paid, they were bid in for the State, and the State title was sold in June, 1897, to Sherwood, and in September, 1897, he conveyed the property to the plaintiff. On January 10, 1898, the auditor general issued a certificate of error canceling the deed to Sherwood, and assigning in the certificate, as ground therefor, that the land was erroneously returned delinquent, advertised for sale, and sold for taxes assessed for the year 1893, for the reason that the warrant for the collection of taxes did not include sidewalk taxes for that year. A writ of *certiorari* was issued to the auditor general, and the retur

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shows that the certificate of error was given for the reason above stated. The return also shows that it was at the same time shown to the auditor general that the record of the common council of the city of Stanton showed that, after said sidewalk was built by the city, a report was made of the cost thereof, and a resolution to assess the sum of $17.67 against these lots, but the record did not show that any action was taken upon the resolution; and that the record of the council showed further that in March, 1894, a report was made by a committee of the council of the uncollected taxes, and that,—

"Owing to a clerical error on the part of Supervisor Lucas in spreading said taxes on the roll, it was considered inadvisable by City Attorney Miller to force collection on the same. Your committee would recommend the correction of the assessment on P. S. Dodge's description, which was spread at $17.67, but by the county clerk in the certificate at $27.86, and the reassessment for 1894 of the above-mentioned sidewalk tax."

It was further made to appear that, by reason of the foregoing, the common council caused this tax to be reassessed in the year 1894, and that, being returned delinquent, the land was sold for said tax. On June 29, 1897, on application of Sherwood, this last sale was canceled, for the reason that it was made to appear that the land had been sold in 1893 for the same tax that was reassessed in 1894. On November 30, 1897, Hinds, the owner, applied to redeem from the sale of 1894, and was informed that the same had been canceled. Thereafter, on full investigation, the auditor general canceled the deed for the tax of 1893, and permitted Hinds to redeem from the tax of 1894.

The plaintiff in *certiorari* contends that matters are set up in the return that are not responsive to the affidavit, and that they are immaterial; that the cancellation must stand upon the alleged defective warrant, if anything; and that, as a defective warrant does not invalidate the lien of the State (*Auditor General* v. *Sparrow*, 116

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Mich. 574), the action of the auditor general was erroneous.

The circuit court, by its decree, adjudged these lands to be chargeable with and subject to sale for the nonpayment of this tax. *Muirhead* v. *Sands*, 111 Mich. 487. The auditor general, by his action, has held that they were not, and the reasons alleged to justify such action are that the tax was not ordered, and that it had been reassessed. In short, he has reversed the decree of the circuit court.

Section 98, Act No. 206, Pub. Acts 1893, allows the auditor to cancel sales upon any one of three grounds:

1. That the land was not subject to taxation at the date of the assessment of the taxes for which it was sold.
2. That the tax had been seasonably paid.
3. That the sale was in contravention of some provision of the act.

None of these grounds are shown. The land was subject to taxation, the tax had not been seasonably paid, and no irregularity in the sale is shown. This order was therefore erroneous, and should be set aside. The plaintiff in *certiorari* should recover costs against Hinds.

GRANT, C. J., concurred with HOOKER, J.

LONG, J. I cannot agree with my Brother HOOKER in this case. Whether or not the common council had the power to cancel the tax of 1893 need not be discussed. Such action was taken by the council that the owner of the premises, Mr. Hinds, had the right to assume that he would not be called upon to pay the tax of 1893, as it was reassessed for the year 1894. It appears by the return of the auditor general that on November 30, 1897, Mr. Hinds, the then owner of the land, applied to him for the redemption of the land under the sale for the tax of 1894. This application was made within the time when such lands were redeemable after sale, and the auditor general very properly received the amount of the tax tendered at that time, and canceled the sale for the tax of 1893, which he

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was empowered to do under subdivision 2, § 98, Act No. 206, Pub. Acts 1893. It is apparent that the owner of the land was led by the action of the common council to believe that by the reassessment in 1894 he would not be called upon to pay the tax within the time limited for the collection thereof under the assessment of 1893, and that a payment of it under the reassessment would be a full compliance with the statute. Feeling secure in this position, he delayed the payment until November 30, 1897, and then it was ascertained that the tax of 1893 had been returned to the auditor general, and a sale made thereunder, and his right to redeem apparently cut off. The auditor general, realizing this condition, and ascertaining that the owner had been misled by the public authorities, canceled the sale of 1893, and received the money in payment of the reassessed tax.

The proceedings in the premises must be affirmed, and writ of *certiorari* quashed.

MONTGOMERY and MOORE, JJ., concurred with LONG, J.

HARRIS v. O'GORMAN.

REPLEVIN—SPECIAL VERDICT—RETURN OF PROPERTY.

A verdict in replevin, simply that "defendant did not unlawfully detain," based on a plea of the general issue, which, under 2 How. Stat. § 8339, puts in issue, not only the detention of the property, but also the property of plaintiff therein, and his right to possession at the time of the commencement of the suit, does not entitle defendant to a return of the property.

Certiorari to Saginaw; Snow, J. Submitted October 25, 1898. Decided November 15, 1898.

Mandamus by Lovina Harris to compel John O'Gor-

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man, justice of the peace, to issue a writ of *retorno habendo*. From an order granting the writ, respondent brings *certiorari*. Reversed.

John E. Nolan, for relator.

James H. Davitt, for respondent.

MONTGOMERY, J. The Singer Manufacturing Company brought replevin before respondent to recover possession of a sewing machine, making one Lovina Harris defendant. On the trial the jury returned as their verdict that "the defendant, Lovina Harris, did not unlawfully detain said sewing machine." The judgment entered on the verdict was that the defendant did not unlawfully detain the said goods and property, and that she recover costs. Subsequently the defendant, Lovina Harris, applied to Judge Snow for a writ of *mandamus* directed to the justice to compel him to issue a writ of *retorno habendo*. The circuit judge granted the writ, and this ruling is before us for review.

The statute (section 8339, 2 How. Stat.) provides:

"The defendant may plead the general issue to such declaration, which shall be in the same form as in personal actions, and shall put in issue not only the detention of the property, but also the property of the plaintiff therein, and his right to the possession thereof at the time of the commencement of the suit, and under such plea the defendant may give notice of any special matter of defense to the action."

The question is whether, under such an issue, a verdict in the form in which that in question was given entitles the defendant to a judgment for the return of the property. The defendant is not in all cases entitled to a return of the property. It may appear that plaintiff is entitled to possession, and yet that judgment ought to go for defendant for the reason that he has not detained the property from the plaintiff. In such cases the verdict and judgment should be limited to a discharge of defendant and

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costs in his favor. *McGregor* v. *Cole*, 100 Mich. 262; *Farrah* v. *Bursley*, Id. 547; *Weber* v. *Henry*, 16 Mich. 399.

It has been held that when the plea presents several issues, and the verdict is general, and broad enough to cover all the issues, as, for instance, "We, the jury, find the issues for the defendant," a return may be adjudged on such a verdict. Wells, Repl. § 753. But when there are several pleas, and the verdict is, "Not guilty," a return cannot be adjudged on such verdict. *Hanford* v. *Obrecht*, 38 Ill. 493; *Ford* v. *Ford*, 3 Wis. 399. It is well settled that at the common law the plea of *non cepit* does not entitle the defendant to the return of the goods. *Pierce* v. *Van Dyke*, 6 Hill, 613. And while, as we have seen, a verdict covering all the issues would entitle the defendant to a return of the property, as would also perhaps a general verdict for the defendant (*Baldwin* v. *Burrows*, 95 Ind. 81), in this case the verdict is not general, but limited to finding a single fact, viz., that defendant did not unlawfully detain the property. This verdict did not cover all the issues which defendant might have presented, possibly not all that she did present. She has, however, not appealed; and, unless we are to supply the defects in the verdict, we cannot treat it as a finding that she is entitled to a return of the property.

The circuit judge was in error. The order will be reversed.

The other Justices concurred.

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WRIGHT *v.* AUDITOR GENERAL.

TAXES—BOARDS OF REVIEW—SUFFICIENCY OF MEETING.

Under section 30 of the tax law of 1893, requiring township boards of review to meet on the fourth Monday in May, at 9 o'clock in the forenoon, and continue in session during that day and the day following, the failure of the board to meet until the second of the specified days will not avoid the tax, although the landowner appeared on the preceding day, and claims to have been unable to attend thereafter.

Appeal from Ogemaw; Sharpe, J. Submitted October 20, 1898. Decided November 15, 1898.

Bill by David Wright and another against the auditor general and others to restrain the collection of certain taxes. From a decree for defendants, complainants appeal. Affirmed.

McDonell & Hall, for complainants.

Albert E. Sharpe, for defendants.

MOORE, J. Complainants filed a bill to restrain the collection of certain taxes, and have appealed from a decree made against them by the trial court. The complainants are owners of a good many descriptions of land situated in various townships. For the purpose of having their lands properly assessed, they sent their agents, who were well acquainted with values, to attend the meeting of the board of review, whose duty it was to meet upon the fourth Monday of May at the office of the supervisor. They arrived at the office about 12 o'clock, and remained until about 3 o'clock. No member of the board of review was present during that time, and the board were not assembled as a board that day. These men were informed that the supervisor was absent from home, and

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would not return for some days. They examined the assessment roll, and prepared a list of the lands assessed to the complainants, and set opposite each description what they regarded as its value for assessment purposes, which list they left at the office of the supervisor. Attached to the list was a written protest against any higher assessment than the values which they had put upon the lands. No one appeared at the office of the supervisor on behalf of complainants after this. It was claimed that it was necessary for the agents of the complainants to spend all of the remaining portion of the day, and the following day, with other boards of review. The record shows that the supervisor was called from home on the preceding week by the illness of his mother. He did not reach home until Monday night. He convened the board of review Tuesday morning, and it remained in session during all that day. It had the list prepared by plaintiffs' agents before it, and passed upon the assessments. It was the opinion of the circuit judge that there was an opportunity for the complainants to appear before the board of review, and that the assessment was not void.

The complainants insist that the failure of the board of review to meet on the first day fixed by law voids the tax, and cite, in support of that proposition, *Township of Caledonia* v. *Rose*, 94 Mich. 216; *Auditor General* v. *Chandler*, 108 Mich. 569. There is language used in these opinions which justifies the claim of the solicitors, but the language was not necessary to the disposition of the cases. In the first case the owner of the land appeared at the place of the meeting, on Monday, to protest against his assessment, and was told by the supervisor the board had adjourned. He asked it to be reconvened. This was refused by the supervisor, and the board was not again in session. In *Auditor General* v. *Chandler* the landowner appeared at the house of the supervisor on Tuesday, and learned from the supervisor the board had adjourned without day. It will be seen that in both of these cases there was no opportunity for the owner of the

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land to have a hearing before the board of review, though he had been diligent in his effort to have a hearing. In this case there was an opportunity for a hearing upon one of the days fixed by law for the hearing. The legislature undertook to provide for such a contingency as occurred here. Section 28, Act No. 206, Pub. Acts 1893, provides for a board of review consisting of three members, a majority of whom shall constitute a quorum. Section 30 provides that the board of review shall meet at the office of the supervisor on the fourth Monday in May, at 9 o'clock in the forenoon, and continue in session during the day and the day following. Section 32 provides that if, from any cause, a quorum shall not be present at any meeting of the board of review, it shall be the duty of the supervisor, or, in his absence, any other member of the board, to notify any absent member to attend at once, and makes it the duty of the member so notified to attend without delay. It also provides that if, from any cause, the second meeting of the board shall not be held at the time fixed therefor, it shall meet the following Monday. Would it be claimed that, under these provisions of the statute, if the board, because of the sickness of some of its members, or illness in their families, or for any other cause, did not convene in the forenoon, it would void the tax even though it was in session in the afternoon? We think this is too narrow a construction to put upon the law. The landowner has a right, up to the last moment fixed by law, to be heard in relation to his assessment, and he cannot be deprived of that right; but where the board, though it may be late in convening, meets during the time fixed by law, and remains in session until the time fixed by law is ended, and has been in session long enough to permit all persons desiring to appear before it to be heard, and to pass intelligently upon the protests, it cannot be said the landowner has not had his day in court.

The decree is affirmed, with costs.

The other Justices concurred.

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LAROUE v. CONWAY.

TOWNSHIP BOARDS—JUSTICES OF THE PEACE—VACANCY IN OFFICE. Under 1 How. Stat. § 744, providing that the two justices of the peace whose terms of office will soonest expire shall be members of the township board, upon a vacancy arising in either of the senior terms the third justice succeeds to membership.

Certiorari to Chippewa; Steere, J. Submitted November 1, 1898. Decided November 15, 1898.

Mandamus by Sarah J. Laroue to compel Edward H. Conway, county treasurer of Chippewa county, to receive and file a liquor bond. From an order denying the writ relator brings *certiorari*. Affirmed.

McDonald & Smith, for relator.

Oren & Webster, for respondent.

GRANT, C. J. This case involves the right of one Charles W. Caley, a justice of the peace, to act as a member of the township board of the township of Superior, Chippewa county. At a meeting of said board there were present the supervisor, the clerk, and one Scribner, a justice of the peace, whose term of office expires in 1899. The office of the justice whose term would have expired July 3, 1898, was vacant. Mr. Caley's term expires July 3, 1900. 1 How. Stat. § 744, provides that the board shall consist of four members,—the supervisor, the clerk, and the two justices of the peace whose terms of office soonest expire. Under the relator's contention, the township board would consist of only three members until the vacancy in the senior term was filled. We are of the opinion that the statute means the two oldest justices at the time holding office. The court below so held, and the judgment is affirmed.

The other Justices concurred.

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PFEIFFER *v.* BOARD OF EDUCATION OF DETROIT.

1. CONSTITUTIONAL INTERPRETATION—RULES OF.
   A constitutional provision could not mean one thing at the time of its adoption, and another thing at a subsequent time; and hence it is to be construed with reference to the state of the law at the time of such adoption, and to the practices and usages then prevailing.

2. SCHOOLS—READINGS FROM BIBLE—JUDICIAL NOTICE.
   Judicial notice may be taken of the practice, which has obtained for many years in the public schools, of reading from the Bible and offering prayer in the presence of the pupils.

3. SAME—CONSTITUTIONAL LAW—CIVIL RIGHTS.
   The use in the public schools, for 15 minutes at the close of each day's session, as a supplemental text-book on reading, of a book entitled "Readings from the Bible," which is largely made up of extracts from the Bible emphasizing the moral precepts of the Ten Commandments, where the teacher is forbidden to make any comment upon the matter therein contained, and is required to excuse from that part of the session any pupil upon application of his parent or guardian, is not a violation of the State Constitution, article 4, § 41, prohibiting the legislature from diminishing or enlarging "the civil or political rights, privileges, and capacities of any person on account of his opinion or belief concerning matters of religion."

4. SAME—APPROPRIATIONS FOR RELIGIOUS SECT OR SEMINARY.
   Nor is it a violation of article 4, § 40, providing that "no money shall be appropriated or drawn from the treasury for the benefit of any religious sect or society, theological or religious seminary, nor shall property belonging to the State be appropriated for any such purposes." [1]

5. SAME—PLACES OF WORSHIP—COMPULSORY ATTENDANCE—TEACHERS OF RELIGION—TAXATION.
   Nor is it a violation of article 4, § 39, providing that "the legislature shall pass no law to prevent any person from wor-

[1] The matter of public aid to sectarian institutions is considered in a note to *Synod of Dakota* v. *State*, (S. Dak.) 14 L. R. A. 418.

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shiping Almighty God according to the dictates of his own conscience, or to compel any person to attend, erect, or support any place of religious worship, or to pay tithes, taxes, or other rates for the support of any minister of the gospel or teacher of religion."

MOORE, J., dissenting.

Certiorari to Wayne; Carpenter, J. Submitted January 26, 1898. Decided December 6, 1898.

Mandamus by Conrad Pfeiffer to compel the board of education of the city of Detroit to discontinue the use in the public schools of a book known as "Readings from the Bible." From an order granting the writ, respondent brings *certiorari*. Reversed.

John C. Tobias (*H. H. Hatch* and *Fred A. Baker*, of counsel), for relator.

Jasper C. Gates (*William E. Baubie*, of counsel), for respondent.

MONTGOMERY, J. The relator applied to the circuit court of Wayne county to compel the respondent to discontinue the use of a certain book, known as "Readings from the Bible," in the public schools of Detroit. The answer of respondent contains the following statement, which we quote:

"It is not true that said book is devoted almost entirely or principally to the subject of religion, to the subject of relations of man to Almighty God, or to the subject of worshiping God, or to all these subjects, but this respondent says that said book is, for the greater part, made up of moral precepts affirming and emphasizing the moral obligations laid down in the Ten Commandments; that, while some of the passages in said book do relate to the power, goodness, and mercy of Almighty God, the said book is made up almost entirely of extracts from the Bible emphasizing the moral precepts of the Ten Commandments, and which are intended merely to inculcate good morals,—that is, our duty to each other,—which ought to be understood and practiced by every good citizen, and concerning the

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fundamental principles of which the religious sects do not disagree. * * * No teacher in said schools is required by law to give instructions from the last said book, except such as is absolutely necessary for the use of the same as a supplemental text-book on reading, and no teacher is by said board allowed to make note or comment upon anything in said book contained; and, further, said book is used as a supplemental text-book on reading, as aforesaid, and not otherwise. * * * It has never been the purpose nor intention of said board to require of the pupils of the grammar grades in said schools to listen to the readings from said book, but, on the contrary, such readings take place at the close of the sessions of said schools, and any and all pupils, by the order of said board, are excused therefrom upon the applications of either their parents or guardians; and, further, said superintendent is not vested with, nor is he authorized to exercise, any discretion whatever in the matter, but is required, under and by the rules of said board, to excuse any and all pupils from being present at such readings whenever an application therefor is made by the parents or guardians of such pupil or pupils."

The contention of relator is that the action of the board is forbidden by the Constitution of the State. The provisions touching this question are as follows (article 4):

"SEC. 39. The legislature shall pass no law to prevent any person from worshiping Almighty God according to the dictates of his own conscience, or to compel any person to attend, erect, or support any place of religious worship, or to pay tithes, taxes, or other rates for the support of any minister of the gospel or teacher of religion.

"SEC. 40. No money shall be appropriated or drawn from the treasury for the benefit of any religious sect or society, theological or religious seminary, nor shall property belonging to the State be appropriated for any such purposes.

"SEC. 41. The legislature shall not diminish or enlarge the civil or political rights, privileges, and capacities of any person on account of his opinion or belief concerning matters of religion."

The precise question is not whether the pupil can be compelled to attend religious exercises, nor necessarily whether the reading of the Bible, or an extract from it, constitutes religious worship; but whether such reading of

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extracts from the Bible, at which reading pupils whose faith or scruples are shocked by hearing the passages read are not required to attend, constitutes the teacher a teacher of religion, or amounts to a restriction of the civil or political rights or privileges of such students as do not attend upon the exercises.

Is the reading of extracts taken from the Bible a violation of the provision of the Constitution which inhibits the diminishing or enlargement of the civil or political rights, privileges, and capacities of the individual on account of his opinion or belief concerning matters of religion? We do not think it can be maintained that this section has any application to this subject. The primary purpose of this provision was to exclude religious tests, and to place all citizens on an equality before the law as to the exercise of the franchise of voting or holding office. The language is inapt to be applied as restricting the use of school-rooms or school funds. It might be said that many of the students in our schools are not in position to avail themselves of the opportunity to study the dead languages. Is it therefore an unjust discrimination to provide for instruction in Latin and Greek for such pupils as are able to devote their time to those studies? Does it harm one who does not, for conscientious reasons, care to listen to readings from the Bible, that others are given the opportunity to do so? Is it not intolerant for one not required to attend to object to such readings? It may be said, of course, that the services of the teacher while engaged in these exercises are paid out of the fund in which all are entitled to share; but the same is true of the time which the teacher devotes to the languages, or instruction in higher mathematics. Does it follow that the civil rights or privileges of the students who do not accept teaching in those branches, or those who do, have been, on the one hand, diminished, or, on the other, enlarged? I do not think it should be so held.

Nor has section 40 any more appropriate application. This section has a very plain meaning, which is that the

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public money may not be turned over to a religious sect to maintain churches or seminaries; and unless the readings from the Bible, or selections from the Bible, constitute the public school a religious or theological seminary, this section has not, in my judgment, any application.

As is stated in the opinion of the learned circuit judge, the most significant provision is section 39; and the meritorious question is whether any student or any taxpayer has been compelled to attend, erect, or support a place of religious worship, or to pay tithes, taxes, or other rates for the support of any minister of the gospel or teacher of religion. In determining this question, we should endeavor to place ourselves in the position of the framers of the Constitution, and ascertain what was meant at the time; for, if we are successful in doing this, we have solved the question of its meaning for all time. It could not mean one thing at the time of its adoption, and another thing today, when public sentiments have undergone a change. *McPherson* v. *Secretary of State*, 92 Mich. 377 (16 L. R. A. 475, 31 Am. St. Rep. 587). It is therefore essential that we determine the intent of this provision by reference to the state of the law or custom previously existing, and by the contemporaneous construction, rather than attempt to test its meaning by the so-called advanced or liberal views obtaining among a large class of the community at the present day.

A similar provision was introduced into the convention of 1835. The provision was as follows:

"Every person has a right to worship Almighty God according to the dictates of his own conscience; and no person can of right be compelled to attend, erect, or support, against his will, any place of religious worship, or pay any tithes, taxes, or other rates for the support of any minister of the gospel or teacher of religion." Const. 1835, art. 1, § 4.

As is pointed out in the brief of the learned counsel for the respondent (to whom we are much indebted for a most laborious and careful research into the historical

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origin of this provision), the provision was doubtless taken from the Virginia constitution of 1830. It is clearly shown by that research that the inhabitants of that commonwealth were by statute compelled to attend upon divine service. Ministers were, in public statutes, referred to as "teachers of religion." In 1784 a statute making provision for the support of ministers of the established church was introduced under the title of "A bill to establish a provision for *teachers of the Christian religion*." This statute was repealed by a general statute adopted in 1786, entitled "An act for establishing religious freedom," the preamble of which clearly shows that the term "teacher of religion" was used as synonymous with "minister." The constitution of 1830 was but an embodiment of this enactment in the organic law of the State. Can it be said that the adoption of this provision into our constitution of 1835 was intended to have a wider scope? I think not. It is significant that this constitution was adopted in pursuance of authority conferred by article 5 of the articles of compact contained in the ordinance of 1787 (*Scott* v. *Detroit Young Men's Society*, 1 Doug. 119), which gave to the people of the territory a right to form a constitution in conformity with the principles contained in the articles. The ordinance of 1787 declared that religion, morality, and knowledge were necessary to good government and the happiness of mankind, and provided that, for these purposes, schools and the means of education should forever be encouraged. It is not to be inferred that, in forming a constitution under the authority of this ordinance, the convention intended to prohibit in the public schools all mention of a subject which the ordinance, in effect, declared that schools were to be established to foster,—particularly as the provision, when traced to its historic origin, is shown to have been aimed at quite another evil. In my opinion, this provision, when incorporated into our organic law, meant simply that the inhabitants of the State should not be required to attend upon those church services which the

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people of Virginia had been by this same enactment relieved from, and that no one should be compelled to pay tithes or other rates for the support of ministers. If this meaning attached at that time, it has not been changed since.

I do not wish to be understood as assenting to the proposition that the ordinance of 1787 makes it imperative that religion shall be taught in the public schools. It was doubtless the opinion of the framers of that great document that public schools would of necessity tend to foster religion. But the extent to which I go is to say that the language of this instrument, when read in the light of the fact that this was at that date a Christian nation, is such as to preclude the idea that the framers of the constitution, "in conformity with the principles contained in the ordinance," intended, in the absence of a clear expression to that effect, to exclude wholly from the schools all reference to the Bible. I should certainly mistrust my judgment if it led me to a different conclusion, and on the best of grounds. The return in this case shows that since the admission of this State into the Union, a period of more than half a century, the practice has obtained in all the State institutions of learning of not only reading from the Bible in the presence of students, but of offering prayer; that the text-books used in the public schools of the State have contained extracts from the Bible, and numerous references to Almighty God and His attributes; and all this without objection from any source. These usages we may also take judicial notice of. In a doubtful case, involving any other question than one which appeals so strongly to the prejudices of men, would not this universal usage, extending over so long a period, be deemed decisive by every one as a practical construction made by the administrative branch of government? Judge COOLEY, in his Constitutional Limitations (page 82, 6th Ed.), says:

"Where a particular construction has been generally accepted as correct, and especially when this has occurred contemporaneously with the adoption of the constitution,

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and by those who had opportunity to understand the intention of the instrument, it is not to be denied that a strong presumption exists that the construction rightly interprets the intention."

See, also, *McPherson* v. *Secretary of State*, 92 Mich. 383 (16 L. R. A. 475, 31 Am. St. Rep. 587), and cases cited.

In treating of the effect of the provision in the several state constitutions corresponding to that under discussion, Judge COOLEY, in the work above cited, says, at page 578:

"The American constitutions contain no provisions which prohibit the authorities from such solemn recognition of a superintending Providence in public transactions and exercises as the general religious sentiment of mankind inspires, and as seems meet and proper in finite and dependent beings. Whatever may be the shades of religious belief, all must acknowledge the fitness of recognizing in important human affairs the superintending care and control of the great Governor of the Universe, and of acknowledging with thanksgiving His boundless favors, or bowing in contrition when visited with the penalties of His broken laws. No principle of constitutional law is violated when thanksgiving or fast days are appointed; when chaplains are designated for the army and navy; when legislative sessions are opened with prayer or the reading of the Scriptures; or when religious teaching is encouraged by a general exemption of the houses of religious worship from taxation for the support of state government."

The weight of the authority of the adjudicated cases sustains the contention of the learned counsel for the respondent. The subject came before the supreme court of Maine as early as 1854. The question arose as to whether the constitution prohibited the reading of the Bible in the public schools, in *Donahoe* v. *Richards*, 38 Me. 379 (61 Am. Dec. 256). The provisions of the Maine constitution are substantially different from ours, and the decision is not, therefore, necessarily decisive. For its force as an argument, however, we quote the following language from pages 398, 399:

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"The common schools are not for the purpose of instruction in the theological doctrines of any religion or of any sect. The State regards no one sect as superior to any other, and no theological views as peculiarly entitled to precedence. It is no part of the duty of the instructor to give theological instruction, and, if the peculiar tenet of any particular sect were so taught, it would furnish a well-grounded cause of complaint on the part of those who entertained different or opposing religious sentiments. But the instruction here given is not in fact, and is not alleged to have been, in articles of faith. No theological doctrines were taught. The creed of no sect was affirmed or denied. The truth or falsehood of the book in which the scholars were required to read was not asserted. No interference, by way of instruction, with the views of the scholars, whether derived from parental or sacerdotal authority, is shown. The Bible was used merely as a book in which instruction in reading was given. But reading the Bible is no more an interference with religious belief than would reading the mythology of Greece or Rome be regarded as interfering with religious belief or an affirmance of the pagan creeds. A chapter in the Koran might be read, yet it would not be an affirmation of the truth of Mohammedanism, or an interference with religious faith. The Bible was used merely as a reading book, and for the information contained in it, as the Koran might be, and not for religious instruction. If suitable for that, it was suitable for the purpose for which it was selected. No one was required to believe, or punished for disbelief, either in its inspiration or want of inspiration, in the fidelity of the translation or its inaccuracy, or in any set of doctrines deducible or not deducible therefrom."

Article 1, § 3, of the constitution of Iowa, is as follows:

"The general assembly shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; nor shall any person be compelled to attend any place of worship, pay tithes, taxes, or other rates for building or repairing places of worship, or the maintenance of any minister or ministry."

I have endeavored to show that "religious teacher," when used in our constitution, is synonymous with "minister." If I have been successful in this, the pro-

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vision of the Iowa constitution is, in substance, identical with section 39 of article 4 of our constitution. In *Moore* v. *Monroe*, 64 Iowa, 367 (52 Am. Rep. 444), the supreme court of Iowa had occasion to consider this provision, and it was held not violated by the reading of the Bible in the public schools. See, also, *Nessle* v. *Hum*, 1 Ohio, N. P. 140; *Spiller* v. *Inhabitants of Woburn*, 12 Allen, 127. *Contra*, *State, ex rel. Weiss*, v. *District School Board*, 76 Wis. 177 (20 Am. St. Rep. 41).

In my opinion, the reading of the extracts from the Bible in the manner indicated by the return, without comment, is not in violation of any constitutional provision. I am not able to see why extracts from the Bible should be proscribed, when the youth are taught no better authenticated truths of profane history.

The order of the circuit court should be reversed.

GRANT, C. J., HOOKER and LONG, JJ., concurred with MONTGOMERY, J.

MOORE, J. (*dissenting*). The questions, both of fact and of law, involved in this case, are so ably stated by Judge Carpenter in his written opinion, that I quote it here:

"Conrad Pfeiffer, a resident of the city of Detroit, a taxpayer therein, and the father of Louis Pfeiffer, a thirteen-year-old boy, who is by law compelled to and does attend the public schools of Detroit, applies in this case for a *mandamus* commanding the respondent, the board of education of the city of Detroit, to discontinue the use of a book entitled 'Readings from the Bible' in said public schools. Respondent, notwithstanding the veto of Honorable George Beck, acting mayor of the city of Detroit, purchased 4,000 copies of this book late in 1896, and introduced them into all the grammar grades of the public schools of the city, under a resolution of which the following is a copy:

"'*Resolved*, that "Readings from the Bible" be read during each daily school session at such times as the superintendent shall direct; and, further, upon the application in writing from the parents or guardian of any pupil, the superintendent be instructed to excuse such pupil from attendance during such readings.'

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"The intent and purpose of respondent was 'to have said books read by teachers in said schools in the presence and hearing of their pupils attending said schools, all to the end that said pupils might become familiar with the contents of said book.' It was conceded on the argument (though I do not find the fact stated in the record) that the superintendent has designated the last 15 minutes of each day for the use of this book. Respondent's answer states that no teacher is required by law to give instructions from such book, 'except such as is absolutely necessary for the use of the same as a supplemental text-book on reading,' and no teacher is allowed by said board to make any note or comment upon anything in said book contained. The single question in this case is whether the action of the respondent in thus introducing this book in the public schools is forbidden by the Constitution of the State of Michigan. The constitutional provisions touching this question are as follows (article 4):

"'SEC. 39. The legislature shall pass no law to prevent any person from worshiping Almighty God according to the dictates of his own conscience, or to compel any person to attend, erect, or support any place of religious worship, or to pay tithes, taxes, or other rates for the support of any minister of the gospel or teacher of religion.

"'SEC. 40. No money shall be appropriated or drawn from the treasury for the benefit of any religious sect or society, theological or religious seminary, nor shall property belonging to the State be appropriated for any such purposes.

"'SEC. 41. The legislature shall not diminish or enlarge the civil or political rights, privileges, and capacities of any person on account of his opinion or belief concerning matters of religion.'

"The most significant provisions of these sections, so far as the question under consideration is concerned, are the prohibition against passing a law to compel any person to pay tithes, taxes, or other rates for the support of a teacher of religion, and the prohibition against the legislature's diminishing or enlarging the civil or political rights, privileges, and capacities of any person on account of his opinion or belief concerning matters of religion. In the view I take of this case, as will hereafter appear, there is no necessity for considering any other of the provisions above quoted.

"Ordinarily, constitutional provisions respecting fundamental rights have a prior history which throws much light upon their construction. I am unable to find,

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notwithstanding the aid of diligent and learned counsel, that these provisions appeared in constitutional or statutory law until they appeared in the constitution of Michigan framed and adopted in the year 1835. In that constitution the sections containing these provisions appeared, not under the title 'Legislative Department,' but under the title 'Bill of Rights,' and they read as follows:

"'SEC. 4. Every person has a right to worship Almighty God according to the dictates of his own conscience; and no person can of right be compelled to attend, erect, or support, against his will, any place of religious worship, or pay any tithes, taxes, or other rates for the support of any minister of the gospel or teacher of religion.'

"'SEC. 6. The civil and religious rights, privileges, and capacities of no individual shall be diminished or enlarged on account of his opinions or belief concerning matters of religion.'

"The language of these significant prohibitions, so far as I can learn, has never received a judicial construction. It is, however, well settled that in construing constitutional provisions they are to be given their natural and ordinary meaning. Cooley, Const. Lim. (6th Ed.) 73. It would seem to follow that the only question to be determined in this case is whether these provisions, according to their natural and ordinary meaning, prohibit respondent taking the action sought to be restrained. Respondent's counsel, however, insist that these provisions are not to be given their natural and ordinary meaning. They insist that the language in the ordinance creating the Northwest Territory, 'religion, morality, and knowledge being essential to good government and the happiness of mankind, schools and the means of education shall forever be encouraged,' enjoins the teaching of religion in the public schools; that this ordinance was a part of the constitution of 1835, and must control the meaning of the language in that constitution just quoted. They contend that the provisions of the constitution must be controlled by the provisions of the ordinance, because the constitution of 1835 was adopted, and Michigan became a state, under the right given in that ordinance to form a permanent constitution and state government when it should have 60,000 inhabitants, 'provided the constitution and government so to be formed shall be republican, and in conformity with the principles contained in these articles,' and because the preamble to the constitution

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asserted a compliance with the conditions of the ordinance.

"Respondent's counsel do not shrink from the logic of their position. They contend that it is the duty of every school board to teach the Christian religion. If their position is sound, not only should the Bible be taught, but all other forms of Christian religious instruction should be given in the schools. If this reasoning is sound, the constitution left it open to the school authorities to determine what variety of Christian religion they should teach, and the school board of the city of Detroit has the power today to have taught in the public schools of the city of Detroit the theological tenets of any Christian church. It is not contended that the people, in adopting a constitution, could not have freed themselves from the provisions of the ordinance referred to, for it is settled by many decisions that they could; but it is contended that they did not. It is not contended that the constitution shall not receive the construction that those adopting it intended, but that such a construction compels the public schools in any way encouraged by the government to teach the Christian religion. If this encouragement takes the form of support by taxation, the constitution, then, according to this construction, compels the payment of taxes for the support of one who teaches the Christian religion. It is therefore seriously contended that the people, when they adopted a constitution saying that no person can of right be compelled to pay taxes for the support of any teacher of religion, intended to compel persons to pay taxes for the support of teachers of religion, because they asserted in the preamble to the constitution that they had complied with the conditions of the ordinance, which imposes such support. It is impossible that the people meant the precise opposite of what they explicitly declared. If the ordinance imposes taxation for the support of teachers of religion, the people, when they asserted that they had complied with its provisions by making a constitution which forbade such support, could not have thought that to be a condition with which they were bound to comply. They expressed themselves clearly in their constitution as to the continuance in force of existing laws by saying (schedule, § 2): 'All laws now in force in the Territory of Michigan, which are not repugnant to this constitution, shall remain in force until they expire by their own limitations, or be altered or repealed by the legislature.' Under this provision, parts of

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the ordinance of 1787 were of legal force in Michigan after the adoption of its constitution; but no part of such ordinance repugnant to the constitution had any legal force, nor has any court so held.

"Nor, in my judgment, are counsel correct in their contention that the language, 'religion, morality, and knowledge being essential to good government and the happiness of mankind, schools and the means of education shall forever be encouraged,' requires religion to be taught in the public schools. This language is clear. It enjoins forever the encouragement of schools and all means of education, because religion, morality, and knowledge, being essential to good government and the happiness of mankind, will be promoted thereby. It is an expression of the faith that I was taught as a child, and that I, in common with many others, still hold, that, as you increase the efficiency of schools and other means of education, religion, morality, and knowledge will prosper. The language in the provision of the ordinance relied upon enjoins the encouragement of schools and the means of education. Schools and the means of education are to be encouraged, not in any prescribed method, but by all feasible methods. That method might take the form of maintaining public schools by taxation. It might take the form of exempting private schools from taxation. *Detroit Home & Day School* v. *City of Detroit*, 76 Mich. 521 (6 L. R. A. 97). If religion must be taught in all schools encouraged, it must be taught in all schools exempt from taxation, and Judge CAMPBELL was wrong, in the case above cited, in expressing the thought that, according to the language under discussion, the property of a school not teaching religion should be exempt from taxation.

"The supreme court of Ohio, in construing a clause of the constitution of that State containing language similar to that under discussion, said:

"'The meaning is that *true* religion, *true* morality, and *true* knowledge shall be promoted by encouraging schools and means of instruction. The last named of these three words, "knowledge," comprehends in itself all that is comprehended in the other two words, "religion" and "morality," and which can be the subject of human instruction. True religion includes true morality. All that is comprehended in the word "religion," or in the words "religion and morality," and that can be the subject of human "instructions," must be included under the general term "knowledge." Nothing is enjoined, therefore, but the encouragement of means of instruc-

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tion in general "knowledge,"—the knowledge of *truth*. The fair interpretation seems to be that true "religion" and "morality" are aided and promoted by the increase and diffusion of "knowledge," on the theory that knowledge is the handmaid of virtue, and that all three—religion, morality, and knowledge—are essential to good government.' *Board of Education of Cincinnati* v. *Minor*, 23 Ohio St. 211, 243 (13 Am. Rep. 233).

"It was decided in that case, as it would follow from the reasoning advanced in this opinion, that, notwithstanding the language of the provision under discussion, the authorities in charge of the schools can exclude religion therefrom. If that provision permits the school board by resolution to exclude religious instruction, it certainly permits the people by constitutional enactment to exclude it. I am clearly of the opinion, therefore, that the constitution of 1835 did not require the Christian religion to be taught in the public schools because of anything contained in the ordinance of 1787; and this disposes of the only claim made in this case that the provisions in question are modified in any way by other parts of the constitution.

"While it is conceded that no authority in charge of any school in Michigan ever took any formal official action introducing the Bible, or any part of it, as a text-book in such school, it is averred in respondent's answer that, from the time the Territory of Michigan came under the dominion of the United States, it has been the constant practice and custom to read the Bible and offer prayer in the public schools of Detroit and of the State, and in the State institutions of learning, in the presence of the pupils, and that this practice has not been objected to by any one. It is insisted that these facts afford evidence of the proper construction of the constitutional provisions involved in this case. If these facts are to have any weight in determining the construction of those provisions, that weight can in no manner depend upon the averments of the answer. A legal construction must be given to the constitution. That construction cannot depend upon facts which must be averred or proved; otherwise a constitutional provision would receive a construction in each case according to the facts proved therein, and should be submitted to the determination of a jury. It is true that in doubtful cases extrinsic facts are considered in determining construction, but these are always facts of which the court takes judicial notice,—such facts of common

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knowledge, facts established by historical or public documents. It follows, therefore, that the court is not aided by the averments in the answer. Possibly the answer, taken in connection with the concession that no school authority ever ordered the Bible to be read in the schools as a text-book, means simply this: That it has been the practice in some schools of this State for teachers who are members of some of the various religious denominations whose doctrines are based upon the Bible to open their schools with selections from the Bible, and with other devotional exercises. Of the existence of such a custom it is not unlikely the courts will take judicial notice. *State, ex rel. Weiss*, v. *District School Board*, 76 Wis. 177 (20 Am. St. Rep. 41).

"The rule determining the admissibility of such customs to affect the construction of constitutional provisions is stated by Judge COOLEY in language which has never been questioned since he framed it, as follows:

"'We think we allow to contemporary and practical construction its full legitimate force when we suffer it, where it is clear and uniform, to solve in its own favor the doubts which arise on reading the instrument to be construed.' Cooley, Const. Lim. (6th Ed.) 86.

"Language could not be clearer than that of the constitutional provisions under discussion. What doubt as to their meaning can possibly arise to one who carefully reads them? 'The legislature shall pass no law * * * to compel any person * * * to pay tithes, taxes, or other rates for the support of any minister of the gospel or teacher of religion.' 'The legislature shall not diminish or enlarge the civil or political rights, privileges, and capacities of any person on account of his opinion or belief concerning matters of religion.' No one has suggested, and I believe no one can point out, any uncertainty in the meaning of this language. It is only by looking outside these provisions, and outside the constitution containing them, that any doubt of their meaning arises. The following language of Judge COOLEY is so directly applicable that it reads as if it were written especially for this case:

"'Possible or even probable meanings, when one is plainly declared in the instrument itself, the courts are not at liberty to search for elsewhere. "Whether we are considering an agreement between parties, a statute, or a constitution, with a view to its interpretation, the thing which we are to seek is the thought which it expresses. To ascertain this, the first resort in all cases is to the

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natural significance of the words employed, in the order of grammatical arrangement in which the framers of the instrument have placed them. If, thus regarded, the words embody a definite meaning, which involves no absurdity and no contradiction between different parts of the same writing, then that meaning, apparent on the face of the instrument, is the one which alone we are at liberty to say was intended to be conveyed. In such a case there is no room for construction. That which the words declare is the meaning of the instrument, and neither courts nor legislatures have a right to add to or take away from that meaning." Cooley, Const. Lim. (6th Ed.) 70, 71.

"After this lengthy discussion, I conclude that the evidence of practical construction is inadmissible, and that the only question in the case is whether these constitutional provisions, according to their natural and ordinary meaning, prohibit respondent's proposed action. Respondent's counsel contend that the prohibition in our present constitution is not a restraint upon the action of respondent, but is only a restraint upon the legislature. The respondent board derives all its powers from the law passed by the legislature. If it has any power to compel the teaching of religion in the public schools, it must have it because it was given it, either expressly or by implication, by a law passed by the legislature. It will not be contended that the legislature could by implication give the board more power than it could give it by express enactment. It follows, therefore, that if the legislature could not by law compel a person to pay taxes for the support of a teacher of religion, or could not by law enlarge or diminish the civil or political rights, privileges, and capacities of a person on account of his religious belief, the respondent cannot. This doctrine is elementary. Cooley, Const. Lim. (6th Ed.) 238, 239.

"Does respondent's action compel the payment of taxes for the support of a teacher of religion? Does it enlarge or diminish the civil rights, privileges, and capacities of any person on account of his opinion or belief concerning matters of religion? As the teachers who use the book are supported in part by taxes, and as no one will deny that the equal right to the benefits and advantages of the public school is a civil right, the answers to the foregoing questions depend on the answer to the following question: Does a teacher who reads the book, 'Readings from the Bible,' to his pupils 15 minutes every day, thereby teach religion? The argument of the senior counsel for the

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respondent in this case assumes that he does, but the answer of respondent denies it. This question must therefore be determined from an examination of the book, and its proposed use by the teacher. The book contains 150 selections taken from the King James version of the Bible, and most of them from the Old Testament. Aside from a few pages of a prefatory character, the book contains nothing except those selections and their headings. The Bible is a religious book, and is the foundation of the religion of a large part of the civilized world. It ought to be unnecessary to prove that 'Readings from the Bible' contains religious instruction. To charge that it does not is to charge that the book is not properly named. From the introductory sketch of the book, it is clearly to be inferred that it was compiled in order that there might be taught in the schools the fundamentals of religion accepted alike by Protestants, Catholics, and Jews. If that purpose were carried out, the book would contain instruction in the fundamentals of religion accepted by Protestants, Catholics, and Jews. If, on the other hand, as vigorously claimed, many selections tend to discredit one of these religions, the book none the less contains religious instruction. Nearly every selection in the book either treats of Almighty God, of some of His attributes, or of man's relation to Him. It is difficult, perhaps impossible, to exactly define 'religion.' But every one will concede that a book treating of Almighty God, His attributes, and man's relation to Him, is a religious book. Is it to be used for the purpose of teaching religion? I think, in determining this question, we should look, not so much at the purpose that the officials who adopted it had in view, as we should at the purpose which the book is calculated to accomplish; but, whether we look at the one or the other, we reach the same conclusion. This book was brought to the attention of respondent board by a report of its committee on textbooks and course of study. They recommended its use in the schools, and in that report stated:

"'Your committee * * * desires to invite the consideration of the board to the matter of securing in our schools an increased attention to the principles of ethics or morals, which are so vitally essential in the formation of a true and well-developed, manly character, which are indispensable for the welfare of the individual, the home, and the nation,—an attention which should inculcate those principles of morality, and even religion, in which the great masses of our people believe, and which should prevail.'

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"What purpose is the book calculated to accomplish? While the design of the compilers of the book was to have the book read 'in unison,' it appears from the admitted facts in this case to be respondent's intention and purpose 'to have said book read by the teachers in said schools in the presence and hearing of their pupils attending said schools, all to the end that said pupils might become familiar with the contents of said book;' and it is to be read, also, without note or comment. Can there be any doubt that the result of such action will tend to the acceptance by those pupils of the statements in the selections as true? If a book on political economy or any science were to be read by a teacher to the pupils without note or comment, would not the pupils accept the teachings of that book as true? Does not the fact that the teacher reads the book without note or comment warrant the pupil in believing that what is read is recommended to him as true? There can be but one answer to these questions. It may be suggested that the contents of the book are not taught to the pupils, because it is simply read to them, without note or comment. As just stated, it is conceded that the book is read to the end that said pupils may become familiar with its contents. The object, then, of reading the book, is to teach the children its contents. Reading it without note or comment is an unusual form of teaching. It may be an imperfect and incomplete form of teaching, but it is teaching, nevertheless, and equally within the constitutional prohibition. *State, ex rel. Weiss*, v. *District School Board*, 76 Wis. 177 (20 Am. St. Rep. 41).

"It is no answer to the charge that the contemplated use of 'Readings from the Bible' is teaching religion, to say that the book also teaches morality. What religious book could not be taught in the schools, if the morality of its doctrines were to determine its use? Teaching religion at the expense of the taxpayers is forbidden by the constitution, and teaching morality is not commanded by it. Nor is it possible to take a middle ground, and insist that the religion of the Bible can be taught in the schools, and other religious teachings excluded. It is impossible to frame an argument which, under our constitution, will permit respondent to carry out its proposed action, which will not permit it to teach any religion it may choose to teach. The constitution prohibits all religious teaching in the public schools, or it prohibits none. The provision

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against compelling a person to pay taxes for the support of a teacher of religion either forbids the proposed use of 'Readings from the Bible,' or it forbids nothing. It seems to me clear that such teacher is a teacher of religion, towards whose support persons are compelled to pay taxes; and therefore the constitution, in explicit language, forbids such proposed use.

"It seems to me equally clear that the action of respondent is in violation of the provision of the constitution that the legislature shall not diminish or enlarge the civil or political rights, privileges, and capacities of any person on account of his opinion or belief concerning matters of religion. The respondent, by its action, gives to those who accept as true the religious teachings of King James' version of the Bible, the right of having their children taught a portion of those teachings at the expense of those who do not accept them as true. Can it be for one moment contended that this does not enlarge the civil rights and privileges of persons holding one religious belief, and diminish the civil rights and privileges of persons holding another religious belief? No one surely will contend that the right to be equally taxed is not a civil right. It would be too clear for argument that the legislature could not tax the members of one church for the purpose of teaching the tenets of another church. It is equally clear that it cannot tax those who do not accept the religion of the Bible, for the purpose of teaching the Bible to the children of those who do accept it. It is clear that every parent has an equal right to have his child educated in the public schools. No one would for a moment contend that this right could be conditioned upon the child of immature years being taught a religion which its parents or guardian disapproved. That would clearly enlarge the rights of those who accept that religion, and diminish the rights of those who reject it. Nor is this difficulty remedied by exempting from attendance at these readings the children whose parents object to it. Those parents and those children have equal rights in the schools with the parents and the children of a different religious belief. By exempting them from attendance at the readings of the book, the children are simply deprived of the right of attending school and receiving instruction during the regular school hours. Those who accept the doctrine of the books receive from the public a religious instruction which is denied to those who reject it.

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"In reaching the foregoing conclusions I have received no direct aid from the decisions in other States passing upon a similar question. In the following cases the right to read the Bible in the schools was sustained: *Moore* v. *Monroe*, 64 Iowa, 367 (52 Am. Rep. 444); *Spiller* v. *Inhabitants of Woburn*, 12 Allen, 127; *Donahoe* v. *Richards*, 38 Me. 379 (61 Am. Dec. 256); *Nessle* v. *Hum*, 1 Ohio, N. P. 140. In *State, ex rel. Weiss*, v. *District School Board*, 76 Wis. 177 (20 Am. St. Rep. 41), the right to read the Bible in the schools was denied. In *Board of Education of Cincinnati* v. *Minor*, 23 Ohio St. 211 (13 Am. Rep. 233), it was held that the Cincinnati board of education had authority to exclude the Bible and all religious teachings from the public schools. In each of these cases the decision turned on the construction of the state constitution. None of those constitutions had language resembling the constitutional provisions of Michigan herein discussed. *Moore* v. *Monroe*, 64 Iowa, 367 (52 Am. Rep. 444), is an authority for the proposition that reading the Bible does not make the school a place of worship, within the meaning of the constitution. Two of the five judges who heard *State, ex rel. Weiss*, v. *District School Board*, 76 Wis. 177 (20 Am. St. Rep. 41), reached an opposite conclusion. If relator's right depended upon the constitutional prohibition against the passage of a law to compel a person to attend, erect, or support any place of worship, these authorities would be valuable. But as his right is clearly determined by other constitutional provisions, as I have herein indicated, these authorities afford no aid. I am glad to say, however, that my conclusion is supported by our greatest authority on constitutional law, who was especially familiar with the Constitution of Michigan. Says Judge COOLEY, in his Constitutional Limitations (pages 575, 576, 6th Ed.):

"'Those things which are not lawful under any of the American constitutions may be stated thus: (1) Any law respecting an establishment of religion. * * * (2) Compulsory support, by taxation or otherwise, of religious instruction. Not only is no one denomination to be favored at the expense of the rest, but all support of religious instruction must be entirely voluntary. It is not within the sphere of government to coerce it.'

"It is urged that relator cannot in his own name, under the authority of *Attorney General, ex rel. Moreland*, v. *Common Council of Detroit*, 112 Mich. 145, and other

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similar cases, maintain this suit. The principle of those cases was that a private person had no right to seek a *mandamus* to redress a purely public grievance. That principle has no application. Relator is not in this case seeking to redress a purely public grievance. His constitutional civil rights have been violated by respondent, and he is seeking appropriate redress. The following cases are exactly in point, and uphold his right to a *mandamus*: *People* v. *Board of Education of Detroit*, 18 Mich. 400; *Holman* v. *Trustees of School District No. 5 of Avon*, 77 Mich. 605 (6 L. R. A. 534); *Jones* v. *Board of Education of Detroit*, 88 Mich. 371.

"It is also urged that relator is not entitled to relief because it does not appear in his petition that anything in the book, 'Readings from the Bible,' is contrary to his opinion or belief concerning matters of religion. If respondent's action is prohibited by the Constitution, as I have tried to prove, that action is totally void. It is not void as to a part of the people, and valid as to the remainder. In this State every one has equal constitutional rights. Nothing could be more intolerable and out of harmony with our Constitution than to limit the right of redress in our courts to those holding certain religious beliefs. Any argument leading to such a conclusion needs no refutation.

"I summarize my conclusions as follows: Our constitutional provisions respecting religious liberty mean precisely what they declare. They forbid any legislative authority compelling a person to pay taxes for the support of a teacher of religion, or diminishing or enlarging the civil rights of any person on account of his religious belief. Respondent's proposed use of 'Readings from the Bible' in the public schools is in direct conflict with these constitutional provisions, and relator, whose constitutional rights are thereby violated, has a right to redress. A writ of *mandamus* should issue according to the prayer of the relator."

The school board has appealed from this decision. It is claimed on its part that article 3 of the ordinance of 1787 requires that religion should be taught in the public schools. The article reads:

"Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools

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and the means of education shall forever be encouraged." 1 How. Stat. p. 29.

It is claimed that, by virtue of the enacting clause in the constitution adopted by the State in 1835, the State adopted the views expressed in the ordinance. That clause reads as follows:

"We, the people of the Territory of Michigan, * * * in conformity to the fifth article of the ordinance providing for the government of the territory of the United States northwest of the river Ohio, * * * and availing ourselves of the aforesaid ordinance of the Congress of the United States of the 13th day of July, 1787, * * * do, by our delegates in convention assembled, mutually agree to form ourselves into a free and independent State, by the style and title of 'The State of Michigan,' and do ordain and establish the following constitution for the government of the same."

Stated in the language of counsel, the claim is—

"That it was the intention of the framers of this ordinance that the Massachusetts system of schools, with their teachings of the Christian religion, should be forever established in the Northwest Territory; that Congress passed it with that intention, and made provisions for its being so carried out; that it was so understood and practically construed by the United States government for over a third of a century; and that the constitution adopted the same view."

The provisions of our present constitution bearing upon the question appear in the opinion of the circuit judge, and it will not be necessary to repeat them here. As I agree in the conclusion reached by the circuit judge, and in part for the reasons stated by him, it will not be necessary to restate those reasons.

In any discussion of the subject, it must not be forgotten the attendance of children of school ages, upon some school where they shall obtain the necessary education which shall fit them, so far as schools can, for the responsibilities and duties of citizenship, is made by our statutes compulsory. Taxes, too, are levied upon the citizen's

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property, whether he has children or not, for the support of the schools. From the very nature of things, the children of most parents, if educated at all, must be educated in the public schools. These facts must be borne in mind when the provisions of the constitution are read and construed.

If, as counsel claim, it is the duty of the State to impart religious instruction, of what shall the instruction consist? Counsel say it shall be instruction in the Christian religion. Is it so easy, then, to decide what constitutes Christian religion? There is not a community which does not contain evidence, in the many churches which exist therein, that men — religious men — are not agreed as to what constitutes the true Christian religion; and we at once find ourselves involved in a maze of controversy, which cannot fail to be harmful to the interests of the common schools, and greatly to impair their usefulness. If the State is bound to provide religious instruction, it has the right, and it is its duty, to decide in what religious education consists, and to say what shall be accepted as religious truth and what rejected as religious error. This, in so far as relates to schools, can only be decided by the officers under whose control the law places the schools. The result will be, where the Protestants are in the majority, religious teachings acceptable to Protestants will be taught; and so, where the Roman Catholics, or the Hebrews, or people of any other religious belief, or of no belief at all, are in the majority, the minority will find taught to their children doctrines which they regard as error. A statement of the situation would seem to lead to the inevitable conclusion that religious instruction is no part of the duty of the State. Suppose, in a given community, the Roman Catholics are in the majority, and elect the school officers, who in turn hire teachers who are in sympathy with the Catholic church, and, upon the theory that it is the duty of the State to teach religion in its schools, exclude the "Bible Readings" in schools, and substitute some book therefor the reading of which would be

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approved by all good Catholics, and disapproved by all Protestants, for the reason that it contained teachings calculated to favor the Catholic religion, and to bring the Protestant religion into disfavor; would not the Protestant then object? Will it answer his objection to say the Protestant children may retire from the regular exercises of the schools, and peruse "Readings from the Bible" in private? The Protestant would object to these conditions, and would have a right to object to them. His right is, however, no greater than the right of the Roman Catholic, the Hebrew, or any other who, upon conscientious grounds, objects to the religious teachings inculcated by the reading of this religious book. It was the purpose of our constitutional provision to place all sects and all religions on an equal plane before the law, giving to none preference over the other. To so frame religious instruction or a religious exercise in the public schools as to exclude or tend to exclude any portion of the community from their enjoyment would to that extent make the teaching of the schools sectarian. So far as religious teaching is concerned, the attitude of the schools should be that of neutrality.

The elements of our population are so diverse—comprising, as it does, Protestants, Roman Catholics, Hebrews, atheists, orthodox Christians, heterodox Christians, and all shades of religious belief—that no system of religion can be taught which would not be objectionable to many of them. It is for the interest of society and the State that all citizens should be interested in the public schools of the State; that all pupils of school ages should be instructed therein; and that all citizens should take pride in, and be the active friends of, the schools. In no other way can the doctrines of republicanism and democracy—the equality of all people before the law—be so effectively promulgated as by having the children of the rich and of the poor, the children of eminent ancestry as well as those of humble origin, taught side by side, each made to feel and know that success in the schools comes to the diligent

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and worthy. The citizens of the State, irrespective of creed and religious belief, will accord to the public schools their hearty and cordial and loving support, when the schools are engaged in their true province, and content themselves with performing their proper functions. It was doubtless to accomplish this purpose that our constitutional provisions were enacted. The history of the relations of religion and the state shows a continuous evolution. It is not long ago that every government had a system of state religion, calling for the organization and support of churches sustained by a general tax. This was true of several of the States. The unbeliever as well as the believer was compelled to pay taxes in support of teachings he believed to be untrue. In some of the States, belief in the Bible and church membership were prerequisites to the right to vote and to hold office. As time passed, the injustice of this in a republic was seen, and it also came to be believed that the cause of true religion would lose nothing by the most complete separation of church and state. The ordinance of 1787 was much more liberal in its utterances in relation to religious liberty than the existing law in the State of Virginia. At that time the commonwealth of Virginia levied a tax for the support of a state church and an ordained clergy. This was forbidden in the ordinance of 1787, and in none of the States subsequently organized in the territory ceded by Virginia has there ever been a state church, or a body of clergy supported otherwise than by voluntary contributions.

Michigan was originally settled by the French, nearly all of whom were members of the Roman Catholic church. Later a large influx of settlers came from New England, New York, New Jersey, and Pennsylvania, nearly all of whom were members of various Protestant denominations. Still later, large accessions to the population were received from Germany, Ireland, Canada, and many other sources. The religious beliefs of these people were diverse, running all the way from the believers in the inspiration of all that

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is written in the Bible to those who say, "I do not know." These people were all citizens, alike interested in the prosperity of the State and its institutions. It is not a far-fetched conclusion to say the framers of our latest constitution understood fully the complex character of our population, and the diversity of religious belief among them. They also understood how important to the welfare of the State was our system of schools, and the education of the children therein, and the necessity of having all the people feel the schools were their schools. As the result of it all, we find the language of our constitution, in its latest utterance, going further in the direction of separating religious instruction from the duty of the State than any language before used in any of the written constitutions. It was evidently the idea that the school system of the State should be so conducted that the children of Catholic and Protestant, Calvinist and Armenian, Hebrew and infidel, might attend its daily sessions, and obtain its benefits, without any discrimination being made in favor of one pupil against another, based upon the religious belief or want of belief of the parents. We all agree that children should be carefully educated in religion. They should be taught to fear God and love their fellow men. They should be made familiar with the truths of the Bible. They should be instructed to remember their Creator in the days of their youth, and to observe His commandments. But this is a branch of education which is not within the province of the State. It belongs to the parents, the home, the Sunday school, the mission, and the church.

It is said that the school board has removed all objections to the religious exercise embraced in the stated reading of this religious book by excusing those children whose parents may request it from joining in it. If, under the ordinance of 1787 and the constitution, it is the duty of the schools to teach religion, as counsel claim, it is not easy to see how the schools can abdicate that function, and teach it to some of the pupils, and fail to teach it to the

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others. Neither would this obviate the difficulty growing out of the fact that the money of the taxpayer is taken from him to impart religious instruction of which he does not approve.

It is said that to grant the prayer of the petitioner is, in effect, to say that the schools shall not have the benefit of the lofty truths contained in the Bible, and will be deprived of its many literary and historical excellences. I cannot agree with this contention. There is a plain and practical distinction between using these selections from the Bible as the basis for a stated religious exercise, and using extracts from it incorporated into the text-books of the schools because of the moral teaching and literary excellence contained therein. The passages incorporated in the text-books are not placed there to give them authority as religious doctrines, but because of the excellence of the thought and the beauty of its expression, just as extracts from Virgil and Homer and other ancient and pagan authors are incorporated. In the case last suggested, it would not for a moment be claimed that the incorporation of these extracts from pagan authors would make the reading of the book containing them instruction in paganism; but suppose a compilation was to be made from the Koran, or from any other book recognized as the basis of any one of the ten great religions of the world, and a stated period of time was set apart daily for the reading of that book; it might then truthfully be urged that pupils were receiving instruction in the religion which was based upon the book which was so read. If the book so selected was not the Bible, would not the believers in the Bible object, and would they not have a right to object, to the reading of the book so selected, upon the ground that the religion taught by the book was favored in the schools, and the religion taught by the Bible was discriminated against?

Judge Carpenter, in his opinion, made a brief reference to the views expressed in Cooley on Constitutional Limitations. That learned author states the situation so clearly, I deem it best to quote him more at length. In the sixth edition (page 571), he says:

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"A careful examination of the American constitutions will disclose the fact that nothing is more fully set forth or more plainly expressed than the determination of their authors to preserve and perpetuate religious liberty, and to guard against the slightest approach towards the establishment of an inequality in the civil and political rights of citizens which shall have for its basis only their differences of religious belief. The American people came to the work of framing their fundamental laws after centuries of religious oppression and persecution, which, sometimes by one party or sect and sometimes by another, had taught them the utter futility of all attempts to propagate religious opinions by the rewards, penalties, or terrors of human laws. They could not fail to perceive, also, that a union of church and state, like that which existed in England, if not wholly impracticable in America, was certainly opposed to the spirit of our institutions, and that any domineering of one sect over another was repressing to the energies of the people, and must necessarily tend to discontent and disorder. Whatever, therefore, may have been their individual sentiments upon religious questions, or upon the propriety of the state assuming supervision and control of religious affairs under other circumstances, the general voice has been that persons of every religious persuasion should be made equal before the law, and that questions of religious belief and religious worship should be questions between each individual man and his Maker. Of these questions, human tribunals, so long as the public order is not disturbed, are not to take cognizance, except as the individual, by his voluntary action in associating himself with a religious organization, may have conferred upon such organization a jurisdiction over him in ecclesiastical matters. These constitutions, therefore, have not established religious toleration, merely, but religious equality; in that particular being far in advance, not only of the mother country, but also of much of the colonial legislation, which, though more liberal than that of other civilized countries, nevertheless exhibited features of discrimination based upon religious beliefs or professions. Considerable differences will appear in the provisions in the state constitutions on the general subject of the present chapter; some of them being confined to declarations and prohibitions whose purpose is to secure the most perfect equality before the law of all shades of religious belief, while some exhibit a

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jealousy of ecclesiastical authority, by making persons who exercise the functions of clergyman, priest, or teacher of any religious persuasion, society, or sect, ineligible to civil office; and still others show some traces of the old notion that truth and a sense of duty do not consort with scepticism in religion. There are exceptional clauses, however, though not many in number; and it is believed that, where they exist, they are not often made use of to deprive any person of the civil or political rights or privileges which are placed by law within the reach of his fellows. Those things which are not lawful under any of the American constitutions may be stated thus:

"1. Any Law Respecting an Establishment of Religion. The legislatures have not been left at liberty to effect a union of church and state, or to establish preferences by law in favor of any one religious persuasion or mode of worship. There is not complete religious liberty where any one sect is favored by the state, and given an advantage by law over other sects. Whatever establishes a distinction against one class or sect is, to the extent to which the distinction operates unfavorably, a persecution, and, if based on religious grounds, a religious persecution. The extent of the discrimination is not material to the principle; it is enough that it creates an inequality of right or privilege.

"2. Compulsory Support, by Taxation or Otherwise, of Religious Instruction. Not only is no one denomination to be favored at the expense of the rest, but all support of religious instruction must be entirely voluntary. It is not within the sphere of government to coerce it.

"3. Compulsory Attendance upon Religious Worship. Whoever is not led by choice or a sense of duty to attend upon the ordinances of religion is not to be compelled to do so by the state. It is the province of the state to enforce, so far as it may be found practicable, the obligations and duties which the citizen may be under or may owe to his fellow citizen or to society; but those which spring from the relations between himself and his Maker are to be enforced by the admonitions of the conscience, and not by the penalties of human laws. Indeed, as all real worship must essentially and necessarily consist in the free-will offering of adoration and gratitude by the creature to the Creator, human laws are obviously inadequate to incite or compel those internal and voluntary emotions which shall induce it; and human penalties, at

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most, could only enforce the observance of idle ceremonies, which, when unwillingly performed, are alike valueless to the participants, and devoid of all the elements of true worship.

"4. Restraints upon the Free Exercise of Religion According to the Dictates of the Conscience. No external authority is to place itself between the finite being and the Infinite, when the former is seeking to render the homage that is due, and in a mode which commends itself to his conscience and judgment as being suitable for him to render, and acceptable to its object."

It was contended in the case of *Board of Education of Cincinnati* v. *Minor*, 23 Ohio St. 211 (13 Am. Rep. 233), as here, that as Ohio was embraced in the territory ceded by Virginia, and came under the provisions of article 3 of the ordinance of 1787, and as its constitution (article 1, § 7) contained these words, "Religion, morality, and knowledge, however, being essential to good government, it shall be the duty of the general assembly to pass suitable laws to protect every religious denomination in the peaceable enjoyment of its own mode of public worship, and to encourage schools and the means of instruction," it was the duty of the schools to impart religious instruction to the pupils. The court discussed the proposition at length, and said:

"We are brought back to the question, What is the true meaning and effect of these constitutional provisions on this subject? Do they enjoin religious instructions in the schools? and does this injunction bind the courts, in the absence of legislation? We are unanimous in the opinion that both these questions must be answered in the negative. * * * We are told that this word 'religion' must mean 'Christian religion,' because 'Christianity is a part of the common law of this country,' lying behind and above its constitutions. Those who make this assertion can hardly be serious, and intend the real import of their language. If Christianity is a law of the state, like every other law, it must have a sanction. Adequate penalties must be provided to enforce obedience to all its requirements and precepts. No one seriously contends for any such doctrine in this country, or, I might almost say, in this age of the world. The only foundation—rather, the only excuse—for the proposition that Christianity is part of the law of

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this country, is the fact that it is a Christian country, and that its constitutions and laws are made by aChristian people. And is not the very fact that those laws do not attempt to enforce Christianity, or to place it upon exceptional or vantage ground, itself a strong evidence that they are the laws of a Christian people, and that their religion is the best and purest of religions? It is strong evidence that their religion is indeed a religion 'without partiality,' and therefore a religion 'without hypocrisy.' True Christianity asks no aid from the sword of civil authority. It began without the sword, and wherever it has taken the sword it has perished by the sword. To depend upon civil authority for its enforcement is to acknowledge its own weakness, which it can never afford to do. It is able to fight its own battles. Its weapons are moral and spiritual, and not carnal. Armed with these, and these alone, it is not afraid nor 'ashamed' to be compared with other religions, and to withstand them single-handed. And the very reason why it is not so afraid or 'ashamed' is that it is not the 'power of man,' but 'the power of God,' on which it depends. True Christianity never shields itself behind majorities. Nero, and the other persecuting Roman emperors, were amply supported by majorities, and yet the pure and peaceable religion of Christ in the end triumphed over them all; and it was only when it attempted itself to enforce religion by the arm of authority that it began to wane. A form of religion that cannot live under equal and impartial laws ought to die, and sooner or later must die.

"Legal Christianity is a solecism,—a contradiction of terms. When Christianity asks the aid of government beyond mere *impartial protection*, it denies itself. Its laws are divine, and not human. Its essential interests lie beyond the reach and range of human governments. United with government, religion never rises above the merest superstition; united with religion, government never rises above the merest despotism; and all history shows us that, the more widely and completely they are separated, the better it is for both. Religion is not—much less is Christianity, or any other particular system of religion—named in the preamble to the Constitution of the United States as one of the declared objects of government; nor is it mentioned in the clause in question, in our own constitution, as being essential to anything beyond mere human government. Religion is 'essential' to much

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more than human government. It is essential to man's spiritual interests, which rise infinitely above, and are to outlive, all human governments. It would have been easy to declare this great truth in the constitution, but its framers would have been quite out of their proper sphere in making the declaration. They contented themselves with declaring that religion is essential to good government; providing for the protection of all in its enjoyment, each in his own way; and providing means for the diffusion of general knowledge among the people. The declaration is, not that government is essential to good religion, but that religion is essential to good government. Both propositions are true, but they are true in quite different senses. Good government is essential to religion for the purpose declared elsewhere in the same section of the constitution, namely, for the purpose of mere protection. But religion, morality, and knowledge are essential to government in the sense that they have the instrumentalities for *producing and perfecting* a good form of government. On the other hand, no government is at all adapted for producing, perfecting, or propagating a good religion. Religion, in its widest and best sense, has most, if not all, the instrumentalities for producing the best form of government. Religion is the parent, and not the offspring, of good government. Its kingdom is to be first sought, and good government is one of those things which will be added thereto. True religion is the sun which gives to government all its true lights, while the latter merely acts upon religion by reflection.

"Properly speaking, there is no such thing as 'religion of state.' What we mean by that phrase is, the religion of some individual, or set of individuals, taught and enforced by the state. The state can have no religious opinions, and, if it undertakes to enforce the teaching of such opinions, they must be the opinions of some natural person or class of persons. If it embarks in this business, whose opinion shall it adopt? If it adopts the opinions of more than one man or one class of men, to what extent may it group together conflicting opinions? or may it group together the opinions of all? And, where this conflict exists, how thorough will the teaching be? Will it be exhaustive and exact, as it is in elementary literature and in the sciences usually taught to children? and, if not, which of the doctrines or truths claimed by

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each will be blurred over, and which taught in preference to those in conflict? These are difficulties which we do not have to encounter when teaching the ordinary branches of learning. It is only when we come to teach what lies 'beyond the scope of sense and reason'—what from its very nature can only be the object of faith—that we encounter these difficulties. Especially is this so when our pupils are children, to whom we are compelled to assume a dogmatical method and manner, and whose faith, at last, is more a faith in us than in anything else. Suppose the state should undertake to teach Christianity in the broad sense in which counsel apply the term, or the 'religion of the Bible,' so as also to include the Jewish faith; where would it begin? how far would it go? and what points of disagreement would be omitted?

"If it be true that our law enjoins the teaching of the Christian religion in the schools, surely, then, all its teachers should be Christians. Were I such a teacher, while I should instruct the pupils that the Christian religion was true, and all other religions false, I should tell them that the law itself was an *unchristian* law. One of my first lessons to the pupils would show it to be unchristian. That lesson would be: 'Whatsoever ye would that men should do to you, do ye even so to them; for this is the law and the prophets.' I could not look the veriest infidel or heathen in the face, and say that such a law was just, or that it was a fair specimen of Christian republicanism. I should have to tell him that it was an outgrowth of false Christianity, and not one of the 'lights' which Christians are commanded to shed upon an unbelieving world. I should feel bound to acknowledge to him, moreover, that it violates the spirit of our constitutional guaranties, and is a state religion in embryo; that, if we have no right to tax him to support 'worship,' we have no right to tax him to support religious instructions; that to tax a man to put down his own religion is of the very essence of tyranny; that, however small the tax, it is a first step in the direction of an 'establishment of religion;' and I should add that the first step in that direction is the fatal step, because it logically involves the last step.

"But it will be asked, How can religion, in this general sense, be essential to good government? Is atheism, is the religion of Buddha, of Zoroaster, of Lao-tse, conducive to good government? Does not the best government require the best religion? Certainly the best government

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requires the best religion. It is the child of true religion, or of truth on the subject of religion, as well as on all other subjects. But the real question here is not what is the best religion, but how shall this best religion be secured? I answer, it can best be secured by adopting the doctrine of this seventh section in our own bill of rights, and which I summarize in two words, by calling it the doctrine of 'hands off.' Let the state not only keep its own hands off, but let it also see to it that religious sects keep their hands off each other. Let religious doctrines have a fair field, and a free intellectual, moral, and spiritual conflict. The weakest—that is, the intellectually, morally, and spiritually weakest—will go to the wall, and the best will triumph in the end. This is the golden truth which it has taken the world eighteen centuries to learn, and which has at last solved the terrible enigma of 'church and state.' Among the many forms of stating this truth as a principle of government, to my mind it is nowhere more fairly and beautifully set forth than in our own constitution. Were it in my power, I would not alter a syllable of the form in which it is there put down. It is the true republican doctrine. It is simple and easily understood. It means a free conflict of opinions as to things divine; and it means masterly inactivity on the part of the state, except for the purpose of keeping the conflict free, and preventing the violation of private rights or of the public peace. Meantime the state will impartially aid all parties in their struggles after religious truth, by providing means for the increase of general knowledge, which is the handmaid of good government, as well as of true religion and morality. It means that a man's right to his own religious convictions, and to impart them to his own children, and his and their right to engage, in conformity thereto, in harmless acts of worship towards the Almighty, are as sacred in the eye of the law as his rights of person or property, and that, although in the minority, he shall be protected in the full and unrestricted enjoyment thereof. The 'protection' guaranteed by the section in question means protection to the minority. The majority can protect itself. Constitutions are enacted for the very purpose of protecting the weak against the strong; the few against the many."

Never at any time in the history of the world was there as much pure religion as today. In no country in the

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world are religious truths more generally entertained than in our own. In no country in the world is there so complete a separation of the church and state as with us. The growth of religious truth is encouraged by the growth of religious freedom. These things were recognized and acted upon by the framers of our organic law. The religious belief of all persons was not simply tolerated, but was placed upon an equality, by them.

The judgment should be affirmed.

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PEOPLE *v.* DETTENTHALER.

PEOPLE, *ex rel.* GROSVENOR, *v.* CALKINS.

1. CONSTITUTIONAL LAW—CONSTRUCTION—STYLE OF STATUTES.
   No constitutional provision will be construed as merely directory. So *held* in a case involving the validity of a statute in the passage of which article 4, § 48, of the State Constitution, requiring the style of laws to be, "The People of the State of Michigan enact," was disregarded.

2. SAME—AMENDMENT—LEGISLATIVE PROCEEDINGS—EVIDENCE.
   Parol evidence that the clerk of the house of representatives noticed the absence of an enacting clause in a senate bill previous to its passage by the house, and brought the matter to the attention of the house, stating that he would enter such a clause, and that he did so before returning the bill to the senate with the advice that it had been so amended by the house, if admissible at all, is insufficient to show an authorized amendment.

3. SAME—GOVERNOR'S SIGNATURE.
   The fact that an enacting clause, which was not a part of an act as passed by the legislature, was supplied before the act was presented for the governor's signature, does not make the act when signed by him a valid law.

4. SAME—OLEOMARGARINE LAW.
   Under the foregoing principles, Act No. 76, Pub. Acts 1897,

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entitled "An act to prevent deception in the manufacture and sale of imitation butter," is unconstitutional.

Exceptions before judgment from superior court of Grand Rapids; Burlingame, J. *Certiorari* to Jackson; Peck, J. Submitted April 19, 1898. Decided December 6, 1898.

Frank J. Dettenthaler was convicted of selling oleomargarine in violation of Act No. 76, Pub. Acts 1897. Reversed.

Mandamus by the people of the State of Michigan, on the relation of Elliott O. Grosvenor, dairy and food commissioner, to compel J. Jay Calkins, police justice of the city of Jackson, to issue a warrant for the arrest of Henry A. Lincoln, charged with selling oleomargarine in violation of Act No. 76, Pub. Acts 1897. From an order denying the writ, relator brings *certiorari*. Affirmed.

Rood & Hindman and *E. F. Sweet*, for appellant Dettenthaler and respondent Calkins.

Fred A. Maynard, Attorney General, and *Frank A. Rodgers*, Prosecuting Attorney (*John G. Hawley* and *Rodgers, McDonald & Corwin*, of counsel), for the people.

HOOKER, J. These cases involve the validity of Act No. 76, Pub. Acts 1897, which is as follows:

"An Act to prevent deception in the manufacture and sale of imitation butter.

"SECTION 1. *The People of the State of Michigan enact*, that no person, by himself or his agents or servants, shall render or manufacture, sell, offer for sale, expose for sale, or have in his possession with intent to sell, any article, product, or compound made wholly or in part out of any fat, oil, or oleaginous substance or compound thereof not produced from unadulterated milk or cream from the same, which shall be in imitation of yellow butter produced from pure unadulterated milk or cream from the

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same: *Provided*, that nothing in this act shall be construed to prohibit the manufacture or sale of oleomargarine in a separate and distinct form, and in such manner as will advise the consumer of its real character, free from coloration or ingredient that causes it to look like butter.

"SEC. 2. Whoever violates any of the provisions of section one of this act shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than fifty dollars, nor more than five hundred dollars, and the costs of prosecution, or by imprisonment in the county jail, or state house of correction and reformatory at Ionia, for not less than six months nor more than three years, or by both such fine and imprisonment, in the discretion of the court, for each and every offense.

"Approved April 15, 1897."

The evidence in the first-entitled cause shows that the defendant was convicted of the alleged offense of selling oleomargarine in contravention of this act. In the other, a complaint was made of a similar act to a justice, who refused to issue the warrant; and, on application, the circuit court denied a *mandamus* to compel it. The cases raise substantially the same questions, and were argued, and will be considered, together.

The validity of the law is questioned. The record shows that this was a senate bill, and passed the senate without the constitutional enacting clause. The records of the house show that the bill was reported by the committee on agriculture and the committee of the whole without amendment, and with the recommendation that it be passed. Under the head of "Third Reading of Bills upon Passage," the record of the house shows that:

"Pending the third reading of the bill, Mr. Chamberlain moved that the bill be recommitted to the committee of the whole, which motion did not prevail. The bill having been read a third time, and the question being upon its passage, pending the taking of the vote Mr. Graham demanded the previous question. The demand was seconded. The question being, 'Shall the main question be now put?' the same was ordered. The bill was then passed, a majority of all the members-elect voting therefor by yeas and nays as follows: Yeas, 56; nays, 19."

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As this is the only time the bill was before the house, we must find that the bill passed the house without an enacting clause, unless the contrary can be shown by other evidence. Counsel undertook to show that it was amended in this particular by the records of the senate and the testimony of the clerk of the house. The evidence is, in brief, that, previous to the passage of the bill in the house, the clerk noticed the absence of the enacting clause, and brought it to the attention of the house, and said that he would enter one, and accordingly wrote the words in the original bill; *i. e.*, the one which was then before the house. He did not testify that the house took any action upon it, or that any record was made of it. The senate record shows that the bill was subsequently returned to the senate, accompanied by a letter from the clerk of the house, reading as follows:

"HOUSE OF REPRESENTATIVES,
"LANSING, April 7, 1897.

"TO THE PRESIDENT OF THE SENATE.

"*Sir:* I am instructed by the house to return to the senate the following bill: Senate bill No. 6, file No. 24, entitled 'A bill to prevent deception in the manufacture and sale of imitation butter,'—and to inform the senate that the house has amended the same as follows: By inserting in line 1, section 1, after the words 'Section 1,' the words, 'The People of the State of Michigan enact.'

"Very respectfully,
"LEWIS M. MILLER,
"Clerk of the House of Representatives.

"In the passage of which, as thus amended, the house has concurred by a majority vote of all the members-elect."

It further appears that the senate concurred in such amendment.

We must determine, therefore, whether the house is shown to have amended the bill by inserting an enacting clause, and, if not, whether the law is valid without it. The most that can be claimed is that there is oral testimony that the clerk announced its absence, and stated that he would supply it. Inferentially, perhaps, we may say

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that there was no objection made; but the evidence is silent as to what, if anything, occurred. There is nothing but this inference of silence which imports acquiescence in the amendment. There is nothing to show definite action by the house, which alone had power to amend the bill before it. So that, if the clause is essential to the validity of the act, we need not discuss the propriety of admitting parol evidence to prove an amendment which should be shown by the record if one was authorized. See *Attorney General* v. *Rice*, 64 Mich. 391; *Hart* v. *McElroy*, 72 Mich. 446 (2 L. R. A. 609); *Sackrider* v. *Board of Supervisors of Saginaw Co.*, 79 Mich. 66.

Is the constitutional enacting clause a requisite to a valid law? This must depend upon whether the constitutional provision is to be considered a mandatory provision or directory merely. See Const. Mich. art. 4, § 48. Among the authorities cited by the relator in support of his contention is that of *Swann* v. *Buck*, 40 Miss. 268. The constitutional provision is similar to ours, and it was held that a substantial compliance was sufficient. In that case the style of the resolution was, "Resolved by the legislature of the State of Mississippi." The court was unable to discover a previous judicial decision of the question, but quoted Mr. Cushing to the effect that the prescribed "form must be strictly pursued, and that no equivalent language will be sufficient," and, while declining to accept his rule, said:

"*It is necessary that every law should show on its face the authority by which it is adopted and promulgated, and that it should clearly appear that it is intended by the legislative power that enacts it that it should take effect as a law.* These conditions being fulfilled, all that is absolutely necessary is expressed. The word 'resolved' is as potent to declare the legislative will as the word 'enacted.'"

The case of *McPherson* v. *Leonard*, 29 Md. 377, held that the provision of the constitution of Maryland was directory, and that the omission of the words, "by the

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general assembly of Maryland," did not render the law invalid. The question appears to have been treated as a new one. The case of *City of Cape Girardeau* v. *Riley*, 52 Mo. 427 (14 Am. Rep. 427), follows the Maryland case in holding the provision directory; the court saying that, after diligent search, no case holding to the contrary had been found. In this case, like the one before us, the entire enacting clause was wanting. In this connection we may add that previous decisions of the same court, holding the provision that writs should run in the name of the State was directory, were given weight. In our State a contrary holding will be found. See *Forbes* v. *Darling*, 94 Mich. 621. There are, however, cases which take a contrary view of the law, and adhere to the doctrine asserted by Mr. Cushing, and the late Mr. Justice COOLEY, in his work on Constitutional Limitations (page 93, 6th Ed.), viz.:

"But the courts tread upon very dangerous ground when they venture to apply the rules which distinguish directory and mandatory statutes to the provisions of a constitution. Constitutions do not usually undertake to prescribe mere rules of proceeding, except when such rules are looked upon as essential to the thing to be done, and they must then be regarded in the light of limitations upon the power to be exercised. It is the province of an instrument of this solemn and permanent character to establish those fundamental maxims, and fix those unvarying rules, by which all departments of the government must at all times shape their conduct; and, if it descends to prescribing mere rules of order in unessential matters, it is lowering the proper dignity of such an instrument, and usurping the proper province of ordinary legislation. We are not, therefore, to expect to find in a constitution provisions which the people in adopting it have not regarded as of high importance, and worthy to be embraced in an instrument which, for a time, at least, is to control alike the government and the governed, and to form a standard by which is to be measured the power which can be exercised as well by the delegate as by the sovereign people themselves. If directions are given respecting the times or modes of proceeding in which a

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power should be exercised, there is at least a strong presumption that the people designed it should be exercised in that time and mode only; and we impute to the people a want of due appreciation of the purpose and proper province of such an instrument when we infer that such directions are given to any other end,—especially when, as has already been said, it is but fair to presume that the people in their constitution have expressed themselves in careful and measured terms, corresponding with the immense importance of the powers delegated, and with a view to leave as little as possible to implication."

There are some cases, however, where the doctrine of directory statutes has been applied to constitutional provisions; but they are so plainly at variance with the weight of authority upon the precise points considered that we feel warranted in saying that the judicial decisions, as they now stand, do not sanction the application. The question arose in Washington Territory, over a law fixing the seat of government, and the opinion of Cushing was quoted and followed. *In re Seat of Government Case*, 1 Wash. T. (N. S.) 116. The case of *State* v. *Rogers* (decided in 1875), 10 Nev. 250 (21 Am. Rep. 738), did the same. An extended discussion of the subject will be found in that case, in support of the proposition that the language of the constitution should be literally followed. The opinion concludes with the following pertinent and emphatic language:

"Our constitution expressly provides that the enacting clause of every law shall be, 'The people of the State of Nevada, represented in senate and assembly, do enact as follows.' This language is susceptible of but one interpretation. There is no doubtful meaning as to the intention. It is, in our judgment, an imperative mandate of the people, in their sovereign capacity, to the legislature, requiring that all laws, to be binding upon them, shall, upon their face, express the authority by which they were enacted; and, as this act comes to us without such authority appearing upon its face, it is not a law."

The case of *State* v. *Patterson*, 98 N. C. 662, is strong in its condemnation of the practice of treating constitu-

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tional requirements as directory. The case of *Powell* v. *Jackson Common Council*, 51 Mich. 129, is not in point, as the bill was duly and seasonably amended, if we may accept the statement of the briefs of the counsel and the syllabus. The trend of the weight of the authority is, in our opinion, against the relator's contention.

It is urged with some plausibility that the insertion of this provision previous to the signature by the governor is a sufficient compliance with the Constitution, from which we understand the claim to be made that, although the enacting clause was wanting when the bill came to the governor, it might have been supplied by him. But it is thought that this proposition is tenable only upon the assumption that the constitutional provision is directory merely. The governor has no power to make laws. The legislative power is in no part vested in him, being by section 1 of article 4 of the Constitution vested in the senate and house of representatives. It is not the design of the Constitution that he should legislate. His office is a check upon the legislature, and he may compel a reconsideration of a bill by seasonably returning it to the appropriate house with his objections to it, and, when the legislature has adjourned, his neglect to sign it prevents it from becoming a law; but he has not the slightest power in framing the law. Indeed, it is a fundamental principle in American constitutions that the executive shall not make laws. The following language from the opinion in the case of *State* v. *Rogers*, 10 Nev. 250 (21 Am. Rep. 738), is *apropos* to this subject:

"Without the concurrence of the senate, the people have no power to enact any law. Every person at all familiar with the practice of legislative bodies is aware that one of the most common methods adopted to kill a bill, and prevent its becoming a law, is for a member to move to strike out the enacting clause. If such motion is carried, the bill is lost. Can it be seriously contended that such a bill, with its head cut off, could thereafter, by any legislative action, become a law? Certainly not. The certificates of the proper officers of the senate and assembly

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that such an act was passed in their respective houses do not and could not impart vitality to any act which upon its face failed to express the authority by which it was enacted."

This being so, the only justification for the insertion of the enacting clause by the governor is to be found in the assumption that it is a clerical omission of an unimportant matter; and it might as well be held that one of the houses, or a clerk, or even the printer of the laws, might make the correction, as that the governor might do it.

Some of the States have sustained laws without enacting clauses, but we do not know of one that has made their validity depend upon the unauthorized action of some officer or person. They have preferred to rest their action upon the well-recognized distinction between mandatory and directory provisions. If the provision is mandatory that the law shall have a prescribed style, and the making of laws is confined to the legislative branch of the government, it cannot be consistently held that omissions of essential parts of a law may be supplied and corrections made by persons without authority; and the public necessities should be much greater than in the present case before such a proposition should be seriously considered. If, on the other hand, there is warrant for treating the provision as directory, a much less dangerous precedent is established. But, as has been shown, the weight of authority forbids it; and, in our opinion, it will be an unfortunate day for constitutional rights when courts begin the insidious process of undermining constitutions by holding unambiguous provisions and limitations to be directory merely, to be disregarded at pleasure. In the present case it will be much better that the legislature shall correct its mistake than that the courts shall sanction the irregular correction.

We are therefore constrained to hold that the law under discussion is void, and in the *certiorari* case the order is affirmed; in that of Dettenthaler the conviction is reversed, and no new trial ordered.

The other Justices concurred.

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PEOPLE *v.* WORDEN GROCER CO.

1. STATUTES—SUBJECT-MATTER—SUFFICIENCY OF TITLE.
   The subject-matter of a statute intended to prevent adulteration of vinegar, or deception in its sale, is sufficiently expressed by a title reading, "An act in relation to the manufacture and sale of vinegar."

2. SAME—CONSTRUCTION—VINEGAR—STANDARD INGREDIENTS.
   Act No. 71, Pub. Acts 1897, forbidding in section 1 the sale of cider vinegar containing less than one and three-fourths per cent. of cider vinegar solids, and providing in section 2 that "fermented vinegar" shall contain, in addition to such per cent. of solids contained in the fruit or grain from which it is made, two and a half tenths of one per cent. ash or mineral matter, requires that all fermented vinegar should come up to such standard, whether made from fruit or grain.

3. SAME—PUBLIC POLICY—LEGISLATIVE CONSIDERATIONS.
   In a prosecution for the sale of vinegar not in compliance with the statutory standard, a contention that the test provided for is arbitrary, unscientific, and not calculated to protect the public health against spurious vinegar, will not be considered, since the investigation of facts entering into questions of public policy merely is exclusively within the province of the legislature.

4. SAME—REASONABLENESS—PROVINCE OF JURY.
   The question of the reasonableness of a statute cannot be submitted to a jury, to be determined from expert testimony.

5. PURE-FOOD LAWS—PROSECUTIONS FOR VIOLATION—DUE PROCESS OF LAW.
   One charged with the sale of vinegar not in compliance with the statutory standard is not entitled to have a sample of the vinegar left with him by the prosecution, nor can he complain, upon conviction, that he was deprived of his property without due process of law because he was unable to obtain a sample for analysis, where he was not prevented from doing so by any person interested in the prosecution of the suit.

6. SAME—INTENT.
   Guilty knowledge or intent is not an element of the offense of

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selling vinegar below the standard prescribed by Act No. 71, Pub. Acts 1897.[1]

Exceptions before judgment from Kent; Adsit, J. Submitted November 18, 1898. Decided December 6, 1898.

The Worden Grocer Company was convicted of selling low-grade vinegar, in violation of Act No. 71, Pub. Acts 1897. Affirmed.

Rood & Hindman, for appellant.

Fred A. Maynard, Attorney General, *Frank A. Rodgers*, Prosecuting Attorney, and *Benn M. Corwin*, Assistant Prosecuting Attorney, for the people.

LONG, J. The complaint in this cause charges that the defendant—

"On February 5, 1898, did unlawfully sell and deliver to John T. Owens, of Benton Harbor, Michigan, a large quantity, to wit, one barrel, of vinegar, which was not then and there in compliance with the provisions of Act No. 71, Pub. Acts 1897, in this, viz.: That said vinegar was sold as 'fermented cider vinegar,' and branded as such; that said vinegar contained less than one and three-fourths per cent., by weight, upon full evaporation (at the temperature of boiling water), of solids contained in the fruit from which said vinegar is fermented, to wit, one and fifty-one one-hundredths per cent. of solids; and said vinegar contained less than two and a half tenths of one per cent. ash or mineral matter, the same being the product of the material from which said vinegar was manufactured, to wit, eight one-hundredths of one per cent. of ash or mineral matter; against the form of the statute in such case made and provided," etc.

The cause was commenced in the police court, and, being removed to the circuit, came on to be heard before a jury. The defendant refused to plead, and coun-

[1] How far intent is an element of a crime is considered at length in a note to *People* v. *Flack*, (N. Y.) 11 L. R. A. 807.

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sel for defendant thereupon made a motion to quash the complaint and summons for several reasons, which will be hereafter discussed. The court, upon the trial, directed a verdict of guilty, and the cause comes to this court on exceptions before judgment.

The title of the act reads, "An act in relation to the manufacture and sale of vinegar, and to repeal Act No. 224 of the Public Acts of 1889, approved," etc. Sections 1 and 2 of the act, being the sections in question, provide:

"SECTION 1. *The People of the State of Michigan enact*, that no person shall manufacture for sale, offer or expose for sale, sell or deliver, or have in his possession with intent to sell or deliver, any vinegar not in compliance with the provisions of this act. No vinegar shall be sold as apple, orchard, or cider vinegar which is not the legitimate product of pure apple juice, known as apple cider, or vinegar not made exclusively of said apple cider, or vinegar into which foreign substance, drugs, or acids have been introduced, as may appear upon proper test, and upon said test shall contain not less than one and three-fourths per cent., by weight, of cider vinegar solids, upon full evaporation at the temperature of boiling water.

"SEC. 2. All vinegar made by fermentation and oxidation without the intervention of distillation shall be branded 'Fermented Vinegar,' with the name of the fruit or substance from which the same is made. And all vinegar made wholly or in part from distilled liquor shall be branded 'Distilled Vinegar,' and all of such distilled vinegar shall be free from coloring matter added during or after distillation, and from color other than that imparted to it by distillation. And all fermented vinegar not distilled shall contain not less than one and three-fourths per cent., by weight, upon full evaporation (at the temperature of boiling water), of solids contained in the fruit or grain from which said vinegar is fermented, and said vinegar shall contain not less than two and a half tenths of one per cent. ash or mineral matter, the same being the product of the material from which said vinegar is manufactured. And all vinegar shall be made wholly from the fruit or grain from which it purports to be or is represented to be made, and shall contain no foreign substance, and shall contain not less than four per cent., by weight, of absolute acetic acid."

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It appears by the testimony that the defendant, a Michigan corporation, doing business at Grand Rapids, on February 5, 1898, sold a barrel of vinegar to one John T. Owens, of Benton Harbor. The sale is admitted. A sample of the vinegar was taken from this barrel, and analyzed by the State analyst, Mr. Fred H. Borradaile. The correctness of this analysis is not disputed. This analysis showed that the vinegar did not comply with the requirements of the statute, in that it did not contain the amount of solids nor the amount of ash or mineral matter required. The contentions made by counsel for defendant mostly relate to the validity of the act.

1. It is contended that the title to the act does not express any object; that the act was intended to prevent deception in the sale of vinegar, or to prevent adulteration of vinegar, but that no such object is expressed in the title, and that the act is therefore in conflict with section 20 of article 4 of the Constitution of this State, which provides that "no law shall embrace more than one object, which shall be expressed in its title." We think this contention sufficiently answered by what was said by this court in *Soukup* v. *Van Dyke*, 109 Mich. 681. There the title was, "An act relative to justices' courts in the city of Grand Rapids." It was said:

"The title is sufficient if it fairly and reasonably announces the object, and that is a single one. If this requirement be observed, the legislature must determine for itself how broad and comprehensive shall be the object of a statute, and how much particularity shall be employed in the title in defining it."

In *People* v. *Kelly*, 99 Mich. 82, the title under discussion was, "An act relative to disorderly persons, and to repeal," etc. See, also, *State, ex rel. Weir*, v. *Davis Co. Judge*, 2 Iowa, 280; *McAunich* v. *Railroad Co.*, 20 Iowa, 342.

2. Counsel contend that, the complaint being drawn under section 2 of the act, no conviction can follow; that, if any violation of the law be found, it is of section 1, and

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not of section 2, of the act; that, therefore, the complaint was drawn under the wrong section. This contention cannot be sustained. It is plain, from the reading of these sections, that the legislature intended that all fermented vinegar should come up to the required standard, whether made from fruit or grain.

3. The defendant contends that the act is unreasonable, and therefore void, as beyond the police power of the State, in that the test for cider vinegar in regard to solids is arbitrary, unscientific, and not calculated to accomplish the end sought by the legislature, viz., to protect the public health against spurious vinegar; that such test is no test, because:

(*a*) Said solids and ash are indifferent ingredients of vinegar, from a hygienic standpoint.
(*b*) Their comparative absence or presence is not an essential ingredient of pure apple cider vinegar.
(*c*) A vinegar can be manufactured which will satisfy the requirements of the statute, and yet contain no materials from apples or the product of apples.
(*d*) A pure apple cider vinegar is frequently made which is below the requirements of the statute in solids and ash.
(*e*) The less proportion of solids is a proof of greater purity in the vinegar, and of its better keeping qualities.

These questions might very properly be addressed to the legislature, but are matters with which the court has nothing to do. It is not a part of the functions of the court to investigate the facts entering into questions of public policy merely. Under our system, that power is lodged in the legislative branch of the government. It belongs to that branch to determine primarily what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety. *Barton* v. *McWhinney*, 85 Ind. 481; *Mugler* v. *Kansas*, 123 U. S. 660; *Powell* v. *Pennsylvania*, 127 U. S. 685. In *People* v. *Snowberger*, 113 Mich. 92, it was said by this court:

"The act may work hardship in many cases, but that

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question is one to be addressed to the legislature, and not to the courts."

The question of the reasonableness of the acts found in many States relative to the sale of milk below a certain standard has been frequently raised in the courts, and the acts upheld. In *Com.* v. *Evans*, 132 Mass. 11, the court, passing upon such a statute, said:

"The intention of the legislature, and the practical operation of this section in connection with the third section, is to provide that it shall be unlawful to sell milk containing less than 13 *per centum* of milk solids. This belongs to the class of police regulations designed to prevent frauds, and to protect the health of the people, which it is within the constitutional power of the legislature to enact."

In *State* v. *Smyth*, 14 R. I. 100 (51 Am. Rep. 344), the court said:

"It was the purpose of the statute to prohibit, not only the dealing in milk which had been adulterated, but also in milk of such inferior quality as to fall below the standard named in section 3. It is equally a fraud on the buyer whether the milk which he buys was originally good and has been deteriorated by the addition of water, or whether in its natural state it is so poor that it contains the same proportion of water as that which has been adulterated."

See, also, *Shivers* v. *Newton*, 45 N. J. Law, 469; *Bertholf* v. *O'Reilly*, 74 N. Y. 509 (30 Am. Rep. 323); *State* v. *Campbell*, 64 N. H. 403 (10 Am. St. Rep. 419).

But counsel contend that the reasonableness of this act is a question of fact for the jury to determine from the expert chemical evidence. This question is neither for the court nor the jury to determine. In *People* v. *Cipperly*, 101 N. Y. 634, 37 Hun, 324, that very question was discussed, and decided adversely to the claim here. It was said:

"The defendant takes the broader ground that the legislature cannot, under the constitution, prohibit the sale

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of milk drawn from healthy cows, which, in its natural state, falls below the standard fixed by the act, unless such milk, or the articles made from it, are in fact unwholesome or dangerous to public health. How is that question of fact to be determined? The court cannot take judicial notice whether milk below the standard is or is not unwholesome or dangerous to public health. Is that to be a question for the jury? If so, the court must charge a jury in each case that, if they find milk below that standard to be unwholesome, then the statute is constitutional; if they find it to be wholesome, then the statute is unconstitutional. Evidently a constitutional question cannot be settled, or, rather, unsettled, in that way. The constitutionality would vary with the varying judgments of juries."

In the emery-wheel case before us in *People* v. *Smith*, 108 Mich. 534 (32 L. R. A. 853, 62 Am. St. Rep. 715), a somewhat similar question was discussed. It was said:

"If the courts find the plain provisions of the Constitution violated, or if it can be said that the act is not within the rule of necessity in view of facts of which judicial notice may be taken, then the act must fall; otherwise it should stand."

See, also, *People* v. *Girard*, 145 N. Y. 109 (45 Am. St. Rep. 595).

4. Counsel also contend that defendant was not allowed, nor could it obtain, a sample of the vinegar in question for analysis, and was deprived of the right to produce evidence as to the amount of solids in the vinegar; and was thus deprived of property without due process of law. The record shows that the defendant was not prevented from getting a sample of the vinegar by any person interested in the prosecution of the suit. The record shows that the only effort it made to get such sample was a letter written to Mr. Owens, who had bought and paid for the vinegar, requesting him to return it, to which the defendant received no reply; and it does not appear that Mr. Owens had any of the vinegar left at that time. No sample was left with the defendant by the prosecution, nor was this necessary. *Com.* v. *Coleman*, 157 Mass. 460.

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5. This statute forbids the manufacture and sale of vinegar not in compliance therewith, and persons manufacturing or selling vinegar below the standard do so at their peril. It is no defense that the person so manufacturing or selling vinegar below the standard has no knowledge that it is not within the standard prescribed. *People* v. *Snowberger*, 113 Mich. 86.

We have examined the other questions raised, but do not deem it necessary to discuss them. They relate mostly to offers of testimony which the court below ruled out, and, we think, properly.

The testimony was uncontradicted that the vinegar sold was not in compliance with the statute. The sale was admitted. The court was not in error in directing the verdict.

The conviction must be affirmed.

MONTGOMERY, HOOKER, and MOORE, JJ., concurred. GRANT, C. J.. did not sit.

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LILLIE *v.* SNOW.

QUIETING TITLE—MAINTENANCE OF BILL—PROCURING TENANT TO SURRENDER POSSESSION.

The fact that defendant in a bill to quiet title lost possession of the lands in suit through the action of complainant's agent in inducing defendant's tenant to surrender possession in order to enable complainant to maintain the bill under 3 How. Stat. § 6626, which authorizes such a suit "against any person not in possession," is no defense, where defendant's title had been cut off by a valid tax deed to complainant; the tenant having the right, under such circumstances, to attorn.

Appeal from Muskegon; Russell, J. Submitted October 6, 1898. Decided December 6, 1898.

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Bill by Ella H. Lillie against James Snow and others to quiet title. From a decree for complainant, defendant Snow appeals. Affirmed.

Walter I. Lillie (*Stephen H. Clink*, of counsel), for complainant.

C. W. Sessions (*Arthur Jones*, of counsel), for defendant Snow.

MONTGOMERY, J. This is an appeal from a decree in complainant's favor, in a bill filed under section 6626, 3 How. Stat., to quiet title to certain lands in Muskegon county. Complainant showed title in herself under a tax deed which established title in herself as against defendant Snow, who held the original title. The only defense attempted was that complainant was not in a position to maintain the bill, for the reason that she had, through her husband and agent, acquired the only possession which she obtained by unfair means, and with the purpose of filing the present bill.

The facts, as disclosed by the record, are that one Louis Rollenhagen became the purchaser of the lands in question under a decree for the taxes of 1893. On the 20th of April, 1897, Rollenhagen conveyed to complainant. At this date defendant Snow was in possession of the property by a tenant, one Sterenburg. Shortly after complainant's purchase, the husband of complainant visited the premises, and, after some negotiations, an agreement was made with the tenant that he vacate the premises and yield up possession to complainant upon complainant paying him the sum of $25, and agreeing that he (Sterenburg) should have the privilege of harvesting a portion of the potatoes then planted. This agreement was effected after Mr. Lillie had stated that he would have the right to apply for a writ to put complainant in possession, and upon his statement that he would prefer to pay the $25 to him (Sterenburg) than to pay a like amount in expenses. Mr. Lillie testified that he had in mind the filing of a bill at this time.

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Does the fact that he had this purpose, together with his obtaining possession in the manner stated, bar the complainant from remedy under this statute? This, it seems to me, should depend on whether he committed any wrong in acquiring possession. The statute provides that any person having the actual possession and legal or equitable title to lands may institute a suit in chancery, etc. Complainant is therefore within the letter of the statute. It has been held, however, that where possession has been obtained by the complainant's wrongful conduct, he is not within the spirit of the statute, and cannot maintain a bill. Defendant relies on these cases. The first is *Stetson* v. *Cook*, 39 Mich. 750. In that case it appeared that one Ellis was in possession of the land under parties in privity with defendant. Complainant made arrangements with Ellis by which complainant was let into possession, and immediately filed the bill to quiet title. The case was not one in which the title of the landlord had terminated either by lapse of time or operation of law, and hence was not within the exception to the general rule that a tenant cannot dispute the landlord's title until he has been reinvested with possession. It is apparent, therefore, that Ellis had been induced to yield up possession in violation of the landlord's rights. It was held that the statute was not intended to reach a case where a party acquires possession by sharp practice.

The case of *Watson* v. *Lion Brewing Co.*, 61 Mich. 595, is also cited. In this case the defendant was in actual possession. The title under which defendant claimed had not terminated, and yet complainant unfairly and surreptitiously gained possession for the express purpose of filing the bill. It was held that he was not entitled to maintain the bill. It is apparent that the court in this last case did not intend to go further than to exclude this remedy in cases where the possession was taken wrongfully or surreptitiously, for in *Board of Supervisors* v. *City of Grand Rapids*, 61 Mich. 173, the same justice who wrote the opinion in *Watson* v. *Lion Brew-*

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ing Co. held that where no other person or municipality had actual or exclusive possession, and the complainant, on the 8th of October, fenced in the *locus in quo*, and maintained possession until October 24th, the complainant had shown a right to maintain the bill.

In the present case the title of defendant had been terminated by operation of law. It was therefore lawful, and no breach of any duty which he owed to the defendant, for the tenant to surrender possession to the true owner. *McGuffie* v. *Carter*, 42 Mich. 497; *Lamson* v. *Clarkson*, 113 Mass. 348 (18 Am. Rep. 498); *Jenkinson* v. *Winans*, 109 Mich. 524. It is difficult to conceive how it can be said that the complainant is in any way culpable in acquiring possession in the manner in which she did. Her title is not disputed. No force was used. No wrongful collusion with one in privity with defendant is shown. She took possession of what was her own, and, having acquired such possession and maintained it for some weeks, filed this bill, which, under the express language of the statute, she was authorized to maintain.

The decree will be affirmed.

The other Justices concurred.

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TATRO v. BROWER.

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152 92

1. ASSUMPSIT—BREACH OF WARRANTY—DAMAGES.

Assumpsit will lie to recover damages for the breach of an express warranty as to the quality of an article sold, although such damages are consequential in their nature.

2. SALE—DEFECTIVE TANK—NEGLIGENCE OF PURCHASER—QUESTION FOR JURY.

The question as to whether a purchaser of tanks for the purpose of storing cider therein should, as a reasonably prudent man, have taken warning from the bursting of a lug on the empty tank, and removed his cider from the other tank, which subsequently burst, is for the jury, where the vendor assumed to account for the first break, and assured the purchaser that the tanks were all right.

Error to Berrien; Coolidge, J. Submitted October 6, 1898. Decided December 6, 1898.

Assumpsit by Louis N. Tatro against Jacob Brower for breach of warranty. From a judgment for plaintiff, defendant brings error. Affirmed.

O'Hara & O'Hara, for appellant.

Gore & Harvey, for appellee.

MONTGOMERY, J. This is an action of *assumpsit* upon an express warranty in the sale of certain storage tanks by defendant to plaintiff. The tanks were purchased by plaintiff for the purpose of storing cider in them. This purpose was known to defendant. There was conflict in the testimony as to the fact of warranty. The jury found with the plaintiff. The plaintiff's testimony on the subject of damages tended to show that, after the tanks were furnished, he caused one of them to be filled with cider, and, when this tank was nearly filled, the lug on the lower hoop of the empty tank broke. Plaintiff sent word to the

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defendant, requesting him to come and fix it. This the defendant refused to do, but plaintiff testifies he caused the lug to be fixed, and a few days later met the defendant, who again assured him that the tanks were all right; that the break was probably caused by a flaw in the iron, and that it would not occur again. The plaintiff then proceeded to fill both tanks. Some two months later certain of the lugs on the tank first filled broke, the staves spread, and the contents of the tank, 5,000 gallons of cider, were lost. Plaintiff recovered, and defendant brings error.

The defendant contends that the action is one sounding in tort, and that as it originated in justice's court, and the amount claimed is more than $100, no jurisdiction was obtained. The fact is, however, that the declaration is in form in *assumpsit*, and it follows that the defendant's objection is without force, unless we accept the view of defendant that, for damages which are consequential, the only remedy is in case. We do not find this contention supported by authority. On the contrary, the rule is that the plaintiff may in some cases choose between *assumpsit* and case, but where there is an express warranty the plaintiff may in *assumpsit* recover adequate damages. 28 Am. & Eng. Enc. Law, 823; *Dushane* v. *Benedict*, 120 U. S. 630; *Carter* v. *Glass*, 44 Mich. 154 (38 Am. Rep. 240), and cases cited.

The only remaining question which merits discussion is whether the instructions properly presented the case to the jury. Defendant's counsel argue with much force that plaintiff discovered the defective character of these tanks in time to have avoided the loss of the cider by the exercise of ordinary caution. Upon full consideration, we are, however, of the opinion that it was a question for the jury, under proper instructions, as to whether the plaintiff, as a reasonably prudent man, should, by the bursting of a lug on the empty tank, have taken warning, and removed the cider from the other tank. In reaching this conclusion we take notice of the fact that the lug which broke was not on the tank the bursting of which afterwards caused the

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damage, and, further, of the fact that the defendant afterwards assumed (according to plaintiff's testimony) to account for the first break, and assured plaintiff that the tanks were all right again. The question was for the jury. Was it properly submitted? Defendant submitted numerous requests along this line, which were not given in the language of counsel, but the circuit judge charged the jury on his own motion as follows:

"Of course, the plaintiff was bound to use good faith. If, after purchasing the tanks, he knew or learned of any defect in the construction of the tanks, it became his duty to communicate that to the defendant, or to take reasonable steps to repair them, and to use ordinary diligence,—that care which a man of ordinary intelligence and care would use under like circumstances. He would have no right to fill the tanks with cider when he had good reason to believe that they were dangerous and might burst. However, the plaintiff was not bound to make a critical examination of the tanks to see if the tank was defective, and he had a right to rely on his warranty. All that devolved upon him was simply that ordinary diligence which a man of ordinary intelligence and diligence would use under like circumstances. The question in this connection is simply this: Was the plaintiff negligent himself or reckless? If so, he cannot recover damages for injuries which he could have prevented by the exercise of ordinary diligence, and which he foresaw himself or must have reasonably anticipated."

We think this instruction embodies a correct statement of the law, and that it was not materially modified by other portions of the charge excepted to.

The judgment will be affirmed.

The other Justices concurred.

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BUSHNELL *v.* ROWLAND.

EQUITY—CONVEYANCES—PAROL AGREEMENT—SPECIFIC PERFORMANCE.

Complainant, after deeding land to defendant upon the parol understanding that defendant should give back a "life-lease deed" to complainant, by the terms of which they might occupy the land together until the death of either, when the title should vest in the survivor, continued to live upon the premises with defendant, and to expend labor and money for the betterment of the land. *Held*, that there was such part performance as entitled complainant, upon defendant's refusal to execute the deed, to maintain a bill under 2 How. Stat. § 6183, for specific performance.

Appeal from Ionia; Davis, J. Submitted October 6, 1898. Decided December 6, 1898.

Bill by Leonard Bushnell against Leonard Rowland for the specific performance of a contract. From a decree for complainant, defendant appeals. Affirmed.

R. A. Hawley, for complainant.

William O. Webster, for defendant.

MONTGOMERY, J. This is a bill filed for specific performance of a contract. The complainant is a young man, and unmarried. The defendant is a man about 70 years of age, and also unmarried, and the uncle of complainant. In March, 1897, the complainant was the owner of 120 acres of land in the township of Campbell, Ionia county, which was mortgaged for about $3,000; the amount being represented in three mortgages, two of which were held by a Mrs. Powers, and the third, in the sum of $900, running to defendant. The complainant also owed unsecured debts amounting to about $500. The evidence shows that in March the complainant received an offer of

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$40 per acre for the lands in question from one William Whitney; the purchase price to be paid in 20 acres of land, at a valuation of $1,200, and the balance in cash. There is no dispute in the record of the fact that complainant received this offer. The complainant's claim is that he informed defendant of this offer, and defendant proposed to him that he (complainant) deed to defendant, and that he (defendant) would give back a "life-lease deed," so called, providing that each might occupy the land during the lives of both, and that at the death of either it should go to the survivor. Defendant further proposed to advance $3,500 upon the land, wherewith to pay the mortgages and enable complainant to meet his outstanding indebtedness. This proposition complainant claims he accepted, and made a deed to defendant; that the execution of the so-called "life-lease deed," and the payment of the balance coming to complainant over and above the mortgages, were postponed from the time the deed was made, in April, until some time in the month of June, when defendant refused to fulfill his part of the agreement, and ordered the complainant to leave the premises.

The question involved is wholly a question of fact. The complainant's testimony shows that, after the agreement was entered into between the parties, they continued to live together upon the premises from April until June. The complainant continued to expend money in trimming the orchard and repairing the fences, and also continued to spend labor for the betterment of the place. This testimony would tend to show that, if complainant's theory of the case was maintained by the proof, he had entered into a performance of the contract in such manner as would entitle him to relief by way of specific performance, under section 6183, 2 How. Stat. Upon the question of fact, the learned circuit judge found the case stated in the bill to be made out by the proofs. A careful reading of the testimony convinces us that this conclusion was fully justified. The parties are at direct variance in their testi-

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mony upon the main question, and in such cases we look for support to the one or the other in the surrounding circumstances. We find complainant's version of the transaction supported by the subsequent conduct; and, furthermore, what is of great significance is that, if defendant's theory be accepted, which is that the complainant deeded the land to him without reserving any consideration other than the payment of the mortgages upon the property, it would appear that the complainant voluntarily sacrificed the difference between the price offered by Mr. Whitney, viz., $4,800, and this sum. This seems incredible, especially in view of the fact that defendant seems to have been a man of considerable means, and complainant a poor man. It is true, the defendant introduced testimony tending to show the value of this land to be much less than the offer of Mr. Whitney, and while it is probable, upon the whole testimony, that the land would not have sold for $4,800 in cash, yet we are fully satisfied that its value was from $3,600 to $4,000, while to the complainant, in view of the offer which he had from Whitney, it was worth much more.

The decree of the circuit court granted the relief prayed, and that decree will be affirmed, with costs.

HOOKER, MOORE, and LONG, JJ., concurred. GRANT, C. J., did not sit.

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KOZMINSKI v. KUZNIAK.

FRAUDULENT CONVEYANCES—HOMESTEAD—RIGHTS OF CREDITORS.

A judgment creditor cannot complain of a transfer by the debtor to his wife of lands the value of which at the time was less than the amount of mortgage and homestead interests therein.

Appeal from Kent; Grove, J. Submitted October 7, 1898. Decided December 6, 1898.

Bill in aid of execution by Jacob Kozminski and wife against John Kuzniak and wife. From a decree dismissing the bill, complainants appeal. Affirmed.

Thompson & Temple, for complainants.

McKnight & McKnight, for defendants.

MONTGOMERY, J. This is a bill filed in aid of execution. The complainants recovered a decree for costs against the defendant John Kuzniak on the 17th of December, 1895. *Kuzniak* v. *Kozminski*, 107 Mich. 444 (61 Am. St. Rep. 344). On the 24th of December, 1895, defendant John transferred to his wife, the co-defendant, a city lot upon which they were then living, and had been for some years, the lot being in size 66x148 feet, and having a small tenement house in addition to the family residence. It appears by the testimony that this lot was bought in two parcels, the first 66x124 feet, and this was conveyed to defendant Teofila Kuzniak in 1880. The remaining 24x66 feet was conveyed by Thomas J. O'Brien, in 1889, to defendant John Kuzniak. The defendant Teofila Kuzniak mortgaged these premises for $800 to one Nicholas Schenhofen, and afterwards, on February 28, 1889, for the purpose of securing an additional loan of $400, executed a warranty deed to Schenhofen, which,

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however, was intended as a mortgage. In 1890 the parties, desiring to make a loan of the Grand Rapids Mutual Building & Loan Association, were advised that the property should be deeded to Mr. Kuzniak, and that he should become a member of the association; and thereupon Mr. Schenhofen made a conveyance to John Kuzniak, and a mortgage on the entire lot was given to the association in the sum of $1,500. This loan was afterwards transferred, and a mortgage is now held upon the property by Horace J. Tuttle in the amount of $1,350. As before stated, after this mortgage was made, the property was conveyed by the defendant John Kuzniak to his wife. The evidence shows the value of this property at the time of the transfer to have been not to exceed $2,500 to $2,800. The complainants' counsel contend that as to a portion of this lot, at least, there was no homestead right. If we assume this to be true, yet under the ruling in *Armitage* v. *Toll*, 64 Mich. 412, the portion not set aside as a homestead should be first sold to satisfy the mortgage, and the homestead right would apply to the remainder. The mortgage and the homestead right exceed the value of the property, and did at the time of the transfer from defendant John to his wife. It is difficult to see how the complainants were in any way damaged by this transfer. The case is ruled by *Nash* v. *Geraghty*, 105 Mich. 382.

The decree below dismissing the bill is affirmed.

The other Justices concurred.

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MORMAN v. HARRINGTON.

1. VENDOR AND PURCHASER — FRAUDULENT REPRESENTATIONS — EVIDENCE—QUESTION FOR JURY.

In an action by a vendor to recover the price of land, defendant testified that plaintiff represented to him, as an inducement to purchase, that he had examined the land, and found, at a certain depth below the surface, the same plaster rock that was to be found on adjoining land, where there were valuable quarries, with which defendant was familiar; that, relying on such representation, he made the purchase; and that the land proved to be worthless for plaster purposes. *Held*, that the evidence justified the submission to the jury of the question of plaintiff's fraud.[1]

2. SAME—DEFENSE OF FRAUD — ESTOPPEL TO ASSERT — RECOUPMENT.

The fact that a vendee of land paid a balance on the purchase price, and received his deed, after the discovery of fraud on the part of the vendor, will not estop him to recoup his damages occasioned by the fraud, in an action by the vendor upon the vendee's guaranty of stock transferred as part of the consideration.

3. SAME—EVIDENCE OF VALUE.

In support of a defense of fraudulent representations as to the value of land, the vendee may show the price paid by the vendor.

Error to Kent; Grove, J. Submitted October 7, 1898. Decided December 6, 1898.

Assumpsit by Samuel A. Morman against Eli F. Harrington on a contract of guaranty. From a judgment for defendant, plaintiff brings error. Affirmed.

McGarry & Nichols, for appellant.

Crane, Norris & Stevens, for appellee.

[1] The right to rely upon representations made to effect a contract as a basis for a charge of fraud is considered at great length in a note to *Fargo Gaslight & Coke Co.* v. *Fargo Gas & Electric Co.*, (N. Dak.) 37 L. R. A. 593.

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LONG, J. On March 10, 1893, the parties hereto entered into a land contract, by which the defendant became the purchaser from plaintiff of 40 acres of land in Kent county for the price of $7,000. Defendant paid thereon at the date of the contract $4,950 in cash or its equivalent, and turned over to plaintiff at the same time $2,400 of the preferred stock of the Gypsum Plaster & Stucco Company, at a valuation of $2,000; giving at the same time a written agreement to pay the plaintiff $2,000 for the stock whenever it should be rendered worthless by the insolvency of the company. This left only $50 of the purchase price unpaid, which defendant afterwards paid, taking his deed for the land. In May, 1895, the stock of the Gypsum Plaster & Stucco Company became worthless by the insolvency of the company, and plaintiff made demand upon the defendant for the payment of the $2,000. This action was commenced to recover the $2,000 under the contract. The defendant pleaded that the contract was procured by misrepresentations by the plaintiff as to the character of the land, and that he (defendant) was thereby deceived and defrauded, and that he would recoup his damages on the trial. He gave evidence that the lands were sold to him as plaster lands, but that they were in fact worthless for plaster purposes, and good only for farming. He claims that he was not informed that the lands were worthless for plaster until about 18 months after his purchase; that he thereupon employed experienced men to drill into the land at various points, and discovered its character, and so informed plaintiff. No question arises in the case over the fact that the stock was worthless, or that the plaintiff had a right to recover the $2,000. Neither was there any question but that the land was worthless as plaster land. The only question related to the alleged misrepresentations of the plaintiff as to the character of the land. The jury returned a verdict in favor of defendant, and the plaintiff brings error.

1. It is claimed by counsel for plaintiff that there was no evidence given on the trial of any fraudulent state-

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ments on the part of plaintiff which justified the court in submitting the case to the jury. The defendant testified on the trial as follows:

"I asked him why he bought it, and why he wanted to sell it. He told me that at the time he bought it he was engaged in the manufacture of whiting; that business had run out, and he wanted to sell the land. I asked him about the plaster there,—the depth from the surface of the ground. I asked him how he knew about it. He said he had examined the land before he bought the last 20. I asked him what he found. He told me he found the same rock that they had at the Union Mills quarry. I asked him the depth. He said it was about 10 feet before they struck the rock. We talked about the matter considerably. I wanted to get what information he had about it. If I purchased it, I was purchasing it on his statement. I had never been on the land, or made an examination. I did not know whether it was plaster land or not, except as he told me. When he told me he had examined it, and found plaster there at the depth of 10 feet or thereabouts, I believed it. I relied upon his statements as true. I sought no other information than that given me by Mr. Morman in regard to the land, nor had I any other information; and I purchased the land upon the representations made to me by Mr. Morman, and on nothing else. Morman told me he did not know what the combination might be on plaster; that they had practically gone out of the whiting business, and he did not need the land. He said they found the same rock they had in the Union Mills quarry. I was very familiar with the Union Mills quarry. The Union Mills quarry was from 8 to 12 feet below the surface. The top rock was about 8 feet below the surface. The lower strata or lime rock in the Union Mills quarry was from 12 to 13 feet thick. As to the extent of the Union Mills quarry, it was pretty even, except in places where there was no top rock. To the extent that they had quarried out, it was substantially even. The Union Mills quarry was situated about 60 rods from the land in question. The Union Mills Company land adjoins the Morman land, but it is not quarried up to the line."

On cross-examination the defendant testified as follows:

"When I met Morman, on Pearl street, he told me to

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come to his office. I went to his office, and had a talk about the purchase of this property. He told me he was engaged in the manufacture of whiting when he bought this land. He did not tell me he bought it for the purpose of manufacturing whiting, but said he didn't know but he might need it; there might be a combination in the plaster business, so that it would be best for them to own their own quarry. I asked him how he knew this plaster was there, and what there was. He said he examined it before he bought the second 20,—as I understood it, that he made an examination. I do not know whether he stated he made it personally or otherwise, but he examined the property before he bought the second 20, and he ascertained, either by personal examination or by having it examined, that there was plaster rock there. He had made an examination of the land to see what there was there, and he afterwards purchased it. He said he found the same rock that the Union Mills Plaster Company was working on, and that the depth— I was particular about the depth it was, and he said it was about 10 feet.

"*Q.* And that was all he said upon his part, was it not, in respect to that matter?

"*A.* Oh, we talked some about it; but what I was getting at was, what he knew there was in that land. If it was plaster land, I wanted to buy it. He said he found the same rock that the Union Mills was working on, and that it was at the depth of about 10 feet. Upon that statement I made the purchase."

The court charged the jury, substantially, that under the undisputed evidence the plaintiff was entitled to recover the sum of $2,000, unless the defense of false representations set up by the defendant was established by the evidence, and that the burden of proof was upon the defendant to establish it. Upon the question of false representations the court instructed the jury as follows:

"If the jury are satisfied from all the evidence in the case that the plaintiff did make the representations substantially as claimed by the defendant, and as before stated, and are further satisfied from all the evidence that such representations were believed and relied on by the defendant, as claimed, and that such representations were in fact substantially untrue, as claimed by the defendant, as be-

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fore stated, and that the defendant would not have made the purchase in question had the representations not been made, then the defendant is entitled in this action to recoup against the plaintiff the damages he suffered thereby; and this is true whether the representations were made by the plaintiff innocently or not,—the plaintiff being responsible for them in such case, although he believed them to be true. A representation made with a knowledge that it is received in a sense that makes it deceptive is legally fraudulent. Designed partial statements which deceive, and concealment of facts such as to make those declared partial and misleading, are legally fraudulent. If, in this case, you find that the plaintiff represented to the defendant, during the negotiations for the sale of the land, that he had examined the land, and found it contained the same rock as the Union Mills Plaster Company land; and if you find that this statement was reasonably calculated to mean to the defendant, under all the circumstances shown by the evidence, that the land owned by the plaintiff, and which he was about to sell, contained plaster rock in the same degree and in the same way as the lands of the Union Mills Plaster Company, and that the defendant, under all the circumstances, had a right to understand the representation of the plaintiff in that way; and if you find that he purchased the land in reliance upon that representation, and in the belief, based on said representation, that the land contained plaster rock in the same degree and in the same way as the Union Mills Plaster Company land, 'and would not otherwise have purchased the same;' and if you find that in fact this was not the case, and that the defendant was deceived through the representations made by the plaintiff,—then the defendant is entitled to recoup in this action the damages which he sustained on account thereof."

It is true that this testimony was contradicted in great part by the plaintiff, but we are dealing simply with the question as to whether there was any testimony which warranted the court in submitting the question to the jury. We think the court was not in error in this. The land, or a large part of it, had no plaster upon it. If the testimony of the defendant be true, the plaintiff gave him to understand that he had made an examination of the land, or caused one to be made, and had found the same rock

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as in the Union Mills quarry; and this statement was made in answer to an inquiry as to how the plaintiff knew about there being plaster there. It is a case where the plaintiff positively affirmed the facts concerning the quality and value of the land, and his assertion was something more than mere opinion. In the case of *Jackson* v. *Armstrong*, 50 Mich. 65, it was held that one who obtains land in a trade, and before doing so goes upon and looks at it, has nevertheless a right to show that he was misled by the representations of the other party, if they related to matters of which no one could adequately judge on a casual inspection, such as the capability of the land for drainage, and the reason why water was standing. In the present case the value of the land consisted in the plaster rock. No one going upon the land and making a casual inspection could ascertain that fact, for the rock lies some feet beneath the surface. Defendant was assured by plaintiff that it contained the same rock as the Union Mills quarry, which was a valuable property. This was a positive statement of a fact, and the defendant had a right to rely upon it, and was not bound to verify it by an independent investigation. 2 Pom. Eq. Jur. § 895.

2. Counsel for plaintiff also claim that the defendant, having paid the $50 due on the purchase price of the land, and taken the deed, with knowledge of the fraud, is now estopped from making the defense here set up, as the parties cannot be placed *in statu quo*. This contention cannot be sustained. The defendant by his plea set up the fraud in the transaction, and seeks to recoup his damages by reason of it. He had the right to elect his remedy. If he sought to rescind the contract, there would be some force in the contention made by plaintiff's counsel. That is not what is attempted here by the defendant. He proposes to keep what he has received, and recover the damages he has sustained This he has the right to do; and the fact that he paid the balance of the purchase money, and received his deed, after the discovery of the fraud,

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will not estop him from setting up the fraud in defense to the action. *Warren* v. *Cole*, 15 Mich. 265; *Lenox* v. *Fuller*, 39 Mich. 273.

3. It is also claimed that the court erred in permitting counsel for defendant to ask the plaintiff what he paid for the land. There was no error in this. The defense claimed false representations as to value, and in such cases a broad latitude is given. In *Stone* v. *Covell*, 29 Mich. 359, the action was for misrepresentation concerning a note and mortgage taken in exchange for chattels of the plaintiff. Plaintiff was allowed to show the value of the chattels. It was said:

"We think this was entirely proper. This was an action for fraud in a bargain. In determining whether a fraud has been committed, it is always desirable to have the jury enabled to put themselves, as nearly as may be, in the place of the parties, that they may fully appreciate the bearing of their conduct. The value of what is transferred on either side must bear more or less on the motives of both."

See, also, *Ganong* v. *Green*, 71 Mich. 10.

4. Some contention is made that the court permitted the defendant to show alleged frauds outside of those claimed by the pleadings. We have examined the testimony with care, as well as the charge of the court, and are of the opinion that the court confined the defendant to the issues made by the pleadings. We think a discussion of this point is unnecessary. The theory of the plaintiff was submitted to the jury, and the court said to them:

"A question has come into this case. It relates to the fact as to whether the defendant relied solely upon the representations claimed to have been made by the plaintiff, and was induced thereby to purchase the land in question. Therefore, unless you find that Mr. Harrington did rely solely on the plaintiff's representations, and altered his condition solely in consequence of such representations, he would have no cause of complaint, and the plaintiff is entitled to recover."

This part of the charge was certainly as favorable to the plaintiff as he could ask.

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We find no error in the record, and the judgment must be affirmed.

The other Justices concurred.

WEBBER *v.* LAWRENCE.

MORTGAGES—FORECLOSURE—PERSONAL DECREE.

A personal decree upon a bill to foreclose a mortgage will not be granted against one to whom the mortgagor conveyed the mortgaged premises by a deed given as security for the former's promise, in a separate written agreement, to pay the mortgage in case payment should be demanded by the mortgagee, where the latter was not a party to such agreement, and it could not be enforced in favor of the mortgagor because of his breach of its conditions.

Appeal from Saginaw; Wilber, J. Submitted October 18, 1898. Decided December 6, 1898.

Bill by William L. Webber, executor and trustee of the estate of Jesse Hoyt, deceased, against Frank Lawrence, Edward Corning, and others, to foreclose a mortgage. From a decree of foreclosure denying a personal decree against defendant Corning, complainant appeals. Affirmed.

L. T. Durand, for complainant.

John A. McKay, for defendant Corning.

HOOKER, J. On November 10, 1894, Frank Lawrence was the owner of a building in Saginaw, upon which he had previously given a mortgage for $15,000. It was held by the complainant. Lawrence was embarrassed pecuniarily, and on that day he obtained from defendant

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Corning his indorsement upon Lawrence's note for $5,000, which Lawrence negotiated and obtained the money upon. At the same time he executed and delivered to Corning a warranty deed of the premises, which deed contained the following provision, viz.:

"The said Lawrence covenants that he is well seised of the above-granted premises in fee simple; that they are free from all incumbrances whatever, except a mortgage to William L. Webber, executor and trustee, for $15,000; and that he will, and his heirs, executors, and administrators shall, warrant and defend the same against all lawful claims whatsoever, except as against said mortgage to William L. Webber, executor and trustee as aforesaid, which said mortgage is assumed by said second party as a part of the consideration named herein."

The consideration named in the deed was $20,000. Contemporaneously with this deed, the parties signed an agreement, duly acknowledged, referring to said deed, containing the following provisions:

"Now, it is hereby understood and agreed by and between the parties hereof that *said deed is received in trust by the said Edward Corning to secure the said Edward Corning for his indorsement on a promissory note dated November 10, 1894, for $5,000, due in three months, made by Frank Lawrence, and indorsed by Edward Corning, and payable at the Second National Bank of the City of Saginaw, Michigan; and if said Frank Lawrence shall pay said note,* or the renewals thereof, with the interest thereon, and also pay the principal and the interest on a $15,000 mortgage now on said property, held by William L. Webber as executor and trustee, and also keep up and pay all taxes and insurance on said building, and save the said Edward Corning, his heirs or assigns, harmless therefrom, so that he will not be obliged to pay said matters, so that, at the end of five years from the date hereof, the said Lawrence shall not be indebted to the said Edward Corning for any amounts of money which he may be obliged to advance in payment of the said note first referred to, or said mortgage and interest to said William L. Webber, trustee, or for taxes or insurance, then said Edward Corning shall *reconvey said property to said Frank Lawrence,* or to whom he

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may direct; *and this deed is intended, and is given and accepted by both parties hereof, to further secure said Edward Corning*, his heirs or assigns, for such other or further advances in money or other indorsements than herein referred to, and shall *stand as a lien against* said property until all such matters that Edward Corning, his heirs or assigns, holds that he has personally advanced or paid, *until he has been fully paid for* on such matters."

Also, the following clause:

"In consideration of receipt of said deed above referred to, the said Edward Corning, his heirs and assigns, agrees to allow said Frank Lawrence to remain in possession of said property, to keep it for himself, or to lease the same to other parties, and collect the rents for the purpose above mentioned, and possess and handle the said property in every respect as though said deed had been in form a mortgage."

Also, the following clauses:

"Said Lawrence further agrees to collect all rents received from said building, and to deposit such rents in the bank, and the account to be known as 'Frank Lawrence Special Account,' and that no money is to be taken from said account, except in the payment of interest, taxes, insurance, and repairs on said building, or to apply on the principal of the same on the mortgage and note herein referred to.

"And said Edward Corning, his heirs or assigns, hereby agrees to provide funds for the payment of the said $15,000 mortgage held by William L. Webber, trustee, in case payment should be demanded, so that no expense, by foreclosure or otherwise, can be made to affect the interest of the said Lawrence; and said Corning hereby agrees that this agreement shall be binding upon himself for five years from the date hereof, and agrees not to incumber said property in any other manner than is herein specified, and that he will reconvey said property to said Lawrence, or to whom he may direct, by deed with covenants as to his own acts, when he has been paid all liabilities for which he may be liable as mentioned in this agreement."

The bill in this cause was filed June 1, 1896, to foreclose the mortgage mentioned, and Corning is made a party defendant. In it the deed and agreement are set up, and

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the bill prays that Lawrence and Corning be decreed to pay the amount that shall be found due thereon, and that each shall be decreed to be liable to pay any deficiency arising from the sale of the premises. Lawrence filed a cross-bill, setting up the same instruments, and praying that Corning be decreed primarily liable for the amount of said mortgage, and to save him (Lawrence) harmless from a deficiency, if one should arise upon a sale of the premises; but this was stricken from the files upon motion. Corning answered the original bill. The circuit judge decreed foreclosure, and held that Corning was not personally liable for the debt or deficiency. The complainant has appealed.

Lawrence was the principal witness. His testimony shows that he did not deposit the sums received for rentals, or apply all of them in accordance with the terms of the agreement between him and Corning, having used upwards of $2,000 received from rentals for other purposes. It is not certain that this is all, for Lawrence admits that he did not keep an account of the receipts or disbursements; and it does not appear that he has paid the $5,000 note which Corning indorsed. The testimony shows that, before the conveyance and agreement were made, Lawrence and Corning called upon Webber, and an extension of time was obtained upon the mortgage; but the contemplated arrangement was no part of the consideration for the extension. Webber was not informed that such arrangement was in contemplation. Lawrence has been in possession of the premises, and Corning promptly disclaimed ownership and denied liability when Webber suggested that he pay the mortgage. It is plain that Corning was, at most, a mortgagee, and no one contends that he is owner of the premises. Consequently it cannot be said that the assumption of the mortgage constituted a part of the purchase price of the premises, and that Lawrence has put into his hands a fund to pay the mortgage with. The most that can be said is that Corning promised to advance money to pay the mortgage, upon demand, and that Lawrence gave him security

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by way of indemnity therefor; and the same instrument made it optional with Lawrence to make the demand, for it was conditioned upon the failure of Lawrence to pay the mortgage, among other provisions. As already stated, Lawrence failed to perform his part of the agreement, and is now seeking, through this proceeding, to compel the defendant Corning to perform his. Were this an action at law brought by Lawrence to recover damages against Corning for his failure to advance the amount due upon the mortgage, his own breach of the contract would seem to be a sufficient answer. And, if he could not recover in such an action, a court of equity would not afford him relief in this. Hence, if this decree is to be reversed, it must be by reason of some equity in Webber, the mortgagee.

It has already been said that there is no privity of contract between Webber and Corning, and that there is nothing in the nature of an estoppel that renders it inequitable for Corning to refuse payment. He has received no fund that he is equitably bound to apply to such payment, and the land which he has taken a deed of (though it is a mere mortgage), if it can be called such a fund, is within the reach of Webber's mortgage, against the foreclosure of which Corning makes no defense. Counsel for the respective parties have cited cases in support of their contentions, but we think it sufficient to say that it would be manifestly inequitable to give the complainant the benefit of an agreement which ought not to be enforced in favor of his mortgagor. While, under our statute, a court of chancery has the authority to enter a decree for deficiency against one who equitably owes the debt, through an assumption of the mortgage debt as part of the purchase price of the premises, such action is always dependent upon an existing equity either between that person and the mortgagee, or more frequently between him and the mortgagor. Here there is no equity in favor of either. In *Johnson* v. *Shepard*, 35 Mich. 123, it was said:

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"The jurisdiction over persons who have become liable on the debt is not obligatory, but is only permissive. When justice requires that the party shall have a chance to defend himself at law, or to seek redress in any other form against his liability, courts have refused a personal decree."

See, also, *North American Fire Ins. Co.* v. *Handy*, 2 Sandf. Ch. 492, and *Withers* v. *Morrell*, 3 Edw. Ch. 560.

In *Gage* v. *Jenkinson*, 58 Mich. 173, the court said:

"The practice in this class of cases, of allowing a personal decree against even the mortgagor himself, comes from no original equitable jurisdiction, but springs from quite recent statutory authority; and the enforcement of collateral obligations of third persons in a foreclosure suit is a still more recent innovation, and the jurisdiction given over the latter class of persons is permissive only, and not obligatory, and will not be enforced to their prejudice, unless by their own contract or agreement they have themselves made necessary or imperative such enforcement. *Johnson* v. *Shepard*, 35 Mich. 115; *McCrickett* v. *Wilson*, 50 Mich. 513. There is no pretense in this case that the claimed liability of Jenkinson could be enforced at law."

We are of the opinion that the learned circuit judge was clearly right in his disposition of the case, and his decree is affirmed, with costs.

The other Justices concurred.

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WINEMAN *v.* FISHER ELECTRICAL MANUFACTURING CO.[1]

1. CHATTEL MORTGAGES—LEGAL TITLE.
   A chattel mortgage does not transfer the legal title to the mortgagee, but affords a security merely.

2. SAME—ASSIGNMENT FOR CREDITORS—LABOR CLAIMS.
   A chattel mortgage executed by an insolvent to secure a creditor is not an assignment for the benefit of creditors, within 3 How. Stat. § 8749*o*, providing that a person having a preferred labor claim against an insolvent may proceed in chancery for the appointment of a receiver, if a common-law or other assignment for the benefit of creditors shall have been made by the insolvent.

Appeal from Wayne; Adams, J., presiding. Submitted October 19, 1898. Decided December 6, 1898.

Bill by Hugo A. Wineman against the Fisher Electrical Manufacturing Company and others to enforce a labor claim, under 3 How. Stat. § 8749*o*. From a decree dismissing the bill, complainant appeals. Affirmed.

William Stacey, for complainant.

George W. Bates, for defendants.

MONTGOMERY, J. The bill is filed in this case under the provisions of 3 How. Stat. § 8749*m*, to enforce a labor debt against the property of the Fisher Electrical Manufacturing Company, on the ground that certain chattel mortgages had been given on this property, which it is alleged is not sufficient to satisfy said mortgages and the labor claim of complainant. The bill prays that the said labor debt be decreed to be a preferred claim against the assets of the said Fisher Electrical Manufacturing Company, according to the provisions of said act, and that a

[1] Rehearing denied May 23, 1899.

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receiver be appointed to collect the assets, and dispose of sufficient of them to pay said claim and the costs and expenses of these proceedings. The answer denies that the complainant's claim is a labor debt, within the meaning of the statute, and further denies that complainant is entitled to relief in a court of equity under the averments of the bill.

The section of the statute giving a remedy in equity is 8749*o*, and reads as follows:

"Any person having a preferred claim hereunder * * * may proceed in chancery for the appointment of a receiver, and the marshaling of assets, and the application thereof to the payment of the claim or claims involved, *pro rata* or otherwise, in case of any fraud affecting such claim or claims, or the recovery, satisfaction, or payment thereof, or if a common-law or other assignment for the benefit of creditors shall have been made by the defendants or any of them."

The bill does not set up any fraud affecting complainant's claim, or the recovery, satisfaction, or payment thereof. The question, therefore, is whether a chattel mortgage is a common-law or other assignment for the benefit of creditors, within the meaning of this statute. It is clear that a chattel mortgage does not fall within the ordinary meaning of these terms. An assignment for the benefit of creditors is understood to mean a transfer for the benefit of the creditors generally, and not a security by way of mortgage given to one. Indeed, it is conceded that a chattel mortgage is not a general assignment for the benefit of creditors. But it is contended, *first*, that a chattel mortgage is an assignment, for the reason that it transfers the legal title, and, *second*, that, even if it does not transfer the title, but is treated merely as a security, yet it is within the definition of an assignment. To sustain the contention that a chattel mortgage is a transfer of the legal title, *Tannahill* v. *Tuttle*, 3 Mich. 104 (61 Am. Dec. 480), is cited. This decision has since been modified. *Lucking* v. *Wesson*, 25 Mich. 443; *People* v.

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Bristol, 35 Mich. 28, in which latter case Mr. Justice CAMPBELL said:

"Under the decisions of this court, mortgaged chattels do not cease to belong to the mortgagor until some steps are taken to end his rights by the enforcement of the mortgage. The mortgage is a mere security to the mortgagee, and not a transfer of title."

While a chattel mortgage may, in a narrow sense, be said to be an assignment, it is not an assignment for the benefit of creditors, within the usual acceptation of that term. *Sheldon* v. *Mann*, 85 Mich. 265; *Warner* v. *Littlefield*, 89 Mich. 329. It would be an enlargement of this statute, not warranted by the text, to hold the terms employed to include chattel mortgages.

The decree dismissing the bill is affirmed.

The other Justices concurred.

WRIGHT *v.* REINELT.

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JUSTICES' COURTS — MISJOINDER OF DEFENDANTS — ABATEMENT — JUDGMENT ON APPEAL.

A misjoinder of defendants in justice's court in an action *ex contractu* is not remedied, so as to sustain a verdict rendered in the circuit, upon their appeal, against only one of them, by Circuit Court Rule No. 27 (c), adopted pursuant to 2 How. Stat. § 6409, making it the duty of the court to provide rules to prevent the abatement of suits for misjoinder; such rule having no application to cases originating in justice's court.

Error to Sanilac; Beach, J. Submitted October 19, 1898. Decided December 6, 1898.

Assumpsit by John L. Wright against John Reinelt and Charles Reinelt for work and labor. From a judg-

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ment for plaintiff against defendant Charles, the latter brings error. Reversed.

J. S. Crandell and *W. H. Burgess*, for appellant.

F. S. Viets and *E. C. Babcock*, for appellee.

GRANT, C. J. Plaintiff brought suit in justice's court, and recovered a verdict against both defendants. Both appealed. In the circuit court, plaintiff recovered verdict against defendant Charles, and the jury found defendant John not liable. The suit was for work and labor, claiming balance on settlement. In the circuit court, defendants pleaded a set-off.

The record contains none of the testimony, and the sole point raised is on the charge of the court. From this it appears that defendant Charles admitted his liability. The sole contention of defendant is that the suit was based upon a joint liability, and that the court erred in not instructing the jury that, if they found there was no joint liability, they must render a verdict for defendants. Cir. Ct. Rule No. 27(*c*) was adopted to meet such cases as this which originated in the circuit courts. *Durgin* v. *Smith*, 115 Mich. 239. It has no application to cases originating in justices courts. *Anderson* v. *Robinson*, 38 Mich. 407. The instruction should have been given.

Judgment reversed, and new trial ordered.

The other Justices concurred.

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WICKING *v.* CITIZENS' MUTUAL FIRE INSURANCE CO.

1. FIRE INSURANCE—AMOUNT OF LOSS—ARBITRATION.
   Plaintiff in an action on an insurance policy cannot claim that an arbitration, in which defendant joined with other companies to determine his loss, was, because of the participation of such companies, not an arbitration under the policy in suit, but a common-law arbitration, where the policy of each of the companies was in the standard form, differing from the others only in the name of the company, and the arbitration was such as is provided for therein. *Connecticut Fire Ins. Co.* v. *Hamilton*, 8 C. C. A. 114, 59 Fed. 258, distinguished.

2. SAME—PROOFS OF LOSS—CAPTIOUS OBJECTIONS.
   That proofs of loss forwarded to and received by the insurer contained no formal address to the company, and failed to state accurately the addresses of other insurers, are objections without force.

3. SAME—LOCATION OF FIRE—SPECIFICATION.
   Where the insurer's agents knew the location of a fire, it is immaterial that the proofs of loss failed to state it with exactness.

4. SAME—INTEREST OF INSURED—ACCURACY OF STATEMENT.
   The fact that the statement of ownership in proofs of loss was made in the present tense, while the proofs were dated some days later than the fire, does not repel the inference that the statement was understood by the parties to refer to the time of the loss.

5. SAME—WAIVER.
   Defects in proofs of loss, and insured's refusal to submit to an examination under oath as provided by the policy, are waived by negotiations for settlement being renewed, and insured's going to a place by appointment with and request of the insurer, at an expenditure of time and money, and making a statement of his business, and offering to be questioned under oath.

Error to Shiawassee; Smith, J. Submitted October 19, 1898. Decided December 6, 1898.

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Assumpsit by Frank E. Wicking and Frederick J. Storrer, copartners as Wicking & Storrer, against the Citizens' Mutual Fire Insurance Company, of Jackson, on a policy of insurance. From a judgment for plaintiffs, defendant brings error. Affirmed.

This is an action to recover for a loss by fire under a policy of insurance issued November 17, 1895, the fire occurring about midday January 1, 1896. The policy was for $1,000. The goods were insured in eight other companies, for $8,500. The defendant and the other companies were promptly notified of the fire. The secretary and adjuster of the defendant, and also the adjusters of other companies, visited the store. Some of the goods were completely destroyed, and the rest damaged by smoke and water. Under the instruction of the adjusters, plaintiffs moved the goods into another building, arranged them according to the damage done, and made an inventory. Plaintiffs and the adjusters could not agree upon the amount of damage. Thereupon, according to the terms of the policies, plaintiffs and the insurance companies, including defendant, made an agreement, January 9th, for submission to appraisers. This agreement submitted only the amount of loss and damage, and provided that the appraisement should be—

"*Prima facie* evidence as to the amount of such loss and damage; it being understood that this appointment is without reference to any other questions or matters of difference within the terms and conditions of the insurance, and is of binding effect only so far as regards the actual cash value of, and the loss and damage to, said property."

The arbitrators made an award fixing the sound value to be $14,127.96, and the damage to be $7,552.69. The date of the award was January 24th. On the same day, plaintiffs, learning that the arbitrators were about to conclude the inventory without considering the goods totally destroyed, sent a written communication to them, request-

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ing them to appraise such goods, and offering to submit to them all their books, papers, and inventory made previous to the fire, and all other evidence which they had or could produce. One of the arbitrators indorsed upon the inventory that it did not cover any goods which were entirely destroyed. The adjuster for the defendant and one other adjuster were present while the arbitrators were at work. The companies were satisfied with the award. Plaintiffs were not. The latter part of January, plaintiffs caused another inventory to be taken by three parties. On January 30th, plaintiffs wrote the defendant that they intended to open their store, and commence selling goods, February 5th, which they did. To this letter defendant made no reply until March 7th. The reason given for proceeding to sell is that the goods were deteriorating.

On February 11th, plaintiffs sent by express, to the defendant and each of the other companies, proofs of loss, which were received by the defendant February 14th. On March 7th it made the following reply:

"On the 14th day of February, ult., the Citizens' Mutual Fire Insurance Company, of Jackson, Michigan, received at its head office in that city a package of papers, without any letter or other communication explaining them, consisting of 92 pages of mimeograph, written, and typewritten work. The first page is headed 'Inventory of Wicking & Storrer Stock of Goods.' This part of the work comprises 84 pages. The footings of the 84th page read as follows: 'Cash value of goods which were on hand at time of fire, $15,939.66. Amount of loss thereon, $10,909.95.' The subsequent six pages are typewritten, and purport to be a statement under oath, signed and sworn to by Frank E. Wicking and Frederick J. Storrer, setting forth the following circumstances, viz.: That a fire occurred on the 1st day of January, 1896, which destroyed and damaged 'the aforementioned goods as above set forth;' that the cause of the fire was from a stovepipe; that deponents are sole owners of said stock of goods, and no one else has any interest in the same; that the cash value is 'as above stated,' and the loss is as above stated; that there was no incumbrance on said goods; that there was

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other insurance to the amount of $8,500 (list of companies follows); that copies of all the descriptions and schedules of policies in the following named companies purport to be given, viz.: The Granite State Fire Insurance Co., the British America Assurance Co., the Hartford Fire Insurance Co., the Girard Fire & Marine Insurance Co., the Western Assurance Co., the Delaware Insurance Co., the Northern Assurance Co., and the United States Fire Insurance Co.; that the building in which said goods were situated at the time of the fire was occupied as therein stated. The following and last pages purport to be a true copy, sworn to by Frank E. Wicking and Frederick J. Storrer, of a certain 'Award of Appraisers,' bearing date the 24th day of January, 1896, signed by W. C. Lewis, W. W. Thomas, Samuel Lamfrom, appraisers, in which the sound value was determined to have been $14,127.96 and the loss and damage $7,552.69.

"The foregoing is a short statement of the contents of said package, which, beyond the envelope or covering in which it came, does not seem to be addressed to the said Citizens' Mutual Fire Insurance Company, nor does the name of said company appear anywhere in its text. If said document or package is intended as proofs of loss against the Citizens' Mutual Fire Insurance Company of Jackson, under policy No. 1,021,719, and your claim against said company on account of the fire of January 1, 1896, I am instructed by the said Citizens' Mutual Fire Insurance Company to notify you that the same is incomplete, misleading, and not in accordance with the conditions of said policy, and lies in my office subject to your order. The document or package does not show any connection between the Citizens' Mutual Fire Insurance Company and Wicking & Storrer; it does not refer to a policy of the Citizens' Mutual Fire Insurance Company; nor does it set forth the sum for which said company is liable pursuant to said policy. (See line 3, Michigan standard conditions.) Line 74 of the Michigan standard conditions requires a statement of any changes in the title, use, occupation, location, possession, or exposure of said property since issuing the policy. Your document or package ignores this altogether. The Michigan standard policy contemplates that the insurer shall have true knowledge of the title to property insured from the issuing of the policy till date of fire. Your document or package bears date February 7, 1896, and its

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language is in the present tense, of that date. It states that deponents are sole owners of said stock of goods, and no one else has any interest in the same. The conditions of the policy require a statement of title at the time of the fire, which you have not given. The wordings you have given of the other insurances must be wrong. They are certainly misleading and confusing. You have located the following companies at 116 West Exchange street, viz.: United States, Citizens' Mutual, Girard, Hartford, and British America; the Northern and Delaware at 927 west side of North Washington street; and the Granite State and Western Assurance at the southwest corner of Washington and Exchange streets. You will readily see that, even had your document or package been in all other respects complete and not confusing or misleading, the question of contribution among the various companies which you claim are interested would be one of grave doubt. There is nothing to show whether the fire was at 116 West Exchange street, or at 927 west side of North Washington street, or at the southwest corner of Washington and Exchange streets.

"The Citizens' Mutual Fire Insurance Company, upon receipt of the papers referred to, supposed they were intended to be in compliance with lines 69 to 75 of the conditions of the Michigan standard policy; that the 84 pages of inventory referred to represented the inventory called for by line 69 of said conditions; that the subsequent six pages of typewritten work represented the requirements as laid down in lines 70 to 75 of said conditions; and the two pages headed 'Award of Appraisers' represented a compliance with line 95 of said conditions; thus showing the companies that an inventory had first been prepared, as required by the said conditions, but, differences having arisen regarding the amount of loss and damage, an appraisal was held, and the final result was as stated. This company was, however, advised that the inventory in question was not the one first prepared by you immediately after the fire, and on which differences arose between you and the representatives of the companies on the ground when the agreement for submission to enter into appraisal was made, but that it is something entirely different, and of which they had no knowledge; and, instead of abiding by the award of the appraisers, you have ignored said award, and rely upon the new and strange (to the companies) inventory, consisting of 84 pages re-

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ferred to. The Citizens' Mutual Fire Insurance Company wishes your attention to be drawn to the fact that, under the standard policy of the State of Michigan, the amount of loss is not ascertained in the manner which you have adopted."

On March 26th the proper notary's certificate was sent to the defendant. To this, the defendant, through its adjuster, made the following reply:

"The British America Assurance Company, of Toronto, the Citizens' Mutual Fire Insurance Company, of Jackson, Michigan, the Granite State Fire Insurance Company, of Portsmouth, N. H., the Northern Assurance Company, the United States Fire Insurance Company, of New York, and the Western Assurance Company, of Toronto, have advised me that they have received from you what purports to be certificates from a notary public—Thomas D. Dewey—living nearest to the place of fire, and not related to you, nor interested in the claim, and that he has examined the circumstances of the fire, and the loss on account of said fire to your goods, and that he believes you have sustained loss to the amount of $9,500 and over, by reason of said fire, which I presume is intended by you as compliance with one of my letters to you, dated March 7, 1896. Please let me know at your earliest convenience when you will be prepared to furnish the other information and particulars referred to by me, and required by the conditions of the policy. I would respectfully call your attention to lines 92, 93, 94, and 95 of the Michigan standard conditions, and suggest that you forthwith place the company in possession of the information which the policy calls for."

On April 17th, in reply to a letter from plaintiffs, defendant wrote them that the matter of the adjustment was largely left to Mr. Dodd, its adjuster; that it would write him at once, and apprise them of its determination after hearing from him. On June 9th, the defendant's secretary wrote plaintiffs that he would write Dodd for information. About the same time, Mr. Wilson, the secretary, in conversation with Storrer, said that "it was time something should be done; that our loss should be settled; and he also asked me if we had anything further

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to submit in regard to the amount of loss. I told him 'No,' and he said the only thing he could see that the adjusters were hanging out about was that we owed Wilde Brothers considerable; that his company wanted to pay our loss; and that, as soon as he could see Mr. Dodd, he would let me know." Storrer and plaintiffs' attorney went to Detroit, by appointment, the latter part of June, to meet defendant's adjuster and two adjusters representing other companies, and to discuss the possibility of a settlement. The adjusters said they had no offer to make, and asked if plaintiffs had made up a statement of their business since the fire, to which they replied "No," and feared they would not be able to make one. Plaintiffs made offers of settlement, which were refused. The adjusters stated that if plaintiffs would get up a statement of their business since the fire, as they had asked for, they would come at once, and try to adjust their loss. Plaintiffs went home, made out a statement, and notified Mr. Dodd, who, on June 29th, went to Owosso, and interviewed the plaintiffs. On this occasion, plaintiffs submitted to Mr. Dodd all their books and papers, gave him everything he asked for, answered all his questions in regard to the business after February 5th, and offered to be put under oath if he desired. No agreement was reached, and on July 30, 1896, plaintiffs commenced suit.

The court instructed the jury that the plaintiffs' case must rest solely upon the contract of submission to, and the award of, the appraisers; that in no event could they recover more than two-nineteenths of the award; and left them to determine whether the loss sustained was less than the amount of the award. The jury rendered a verdict based on the award.

Watson & Chapman (*Chamberlain & Guise*, of counsel), for appellant.

Selden S. Miner (*John D. Conely*, of counsel), for appellees.

GRANT, C. J. (*after stating the facts*). 1. Plain-

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tiffs' counsel contend that the submission to arbitration was not under the policy, but outside of it, and that it must stand on the general ground of a common-law arbitration. In support of this, they cite *Connecticut Fire Ins. Co.* v. *Hamilton*, 8 C. C. A. 114, 59 Fed. 258, which is cited with approval in *Hamilton* v. *Phœnix Ins. Co.*, 9 C. C. A. 536, 61 Fed. 385, and *Harrison* v. *German-American Fire Ins. Co.*, 67 Fed. 585. The appraisal demanded in that case was not such as the policy called for. All the companies in that case made a joint demand, but the terms of the policies were different, and each of necessity, therefore, mixed its controversy with the others. On page 118, 8 C. C. A., and page 262, 59 Fed., Judge Severens states wherein these policies differed, and shows that each had a separate and distinct controversy from the others. In this case the policies are all alike, except in the names of the companies, and are those prescribed by the laws of this State. All the companies could therefore join in this arbitration to determine the value of the loss without mixing separate controversies. In other words, the appraisal was just such as each policy provided, and was binding upon plaintiffs and each company only so far as the policy and the submission under it provided. Neither was bound by the appraisal. It was only *prima facie* correct, and either party attacking it assumed the *onus probandi*. If, therefore, the circuit court relied upon the submission as a waiver of all the other provisions of the policy, he was in error. The policy expressly provides that "this company shall not be held to have waived any provision or condition of this policy, or any forfeiture thereof, by any requirement, act, or proceeding on its part relating to the appraisal," etc. It was therefore incumbent on plaintiffs to make proofs of loss, notwithstanding the submission for an appraisal.

2. It is urged that plaintiffs failed to show that they had furnished proofs of loss. By this is meant valid proofs of loss. Proofs were furnished in good faith, and under the belief that they complied with the contract of insurance.

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A copy was produced by plaintiffs upon the trial, and they were examined in regard to it. An extract from it was read in evidence, which showed the goods totally destroyed, and their value, $659.29. It also showed the cash value of the goods on hand at the time of the fire to be $15,939.66, and amount of loss thereon to be $10,909.95. These proofs, called "Exhibit I" in the record, were offered in evidence. They were objected to as "incompetent, irrelevant, and immaterial." After some discussion, the attorney for plaintiffs stated that he withdrew them for the present. It does not appear that they were afterwards offered in evidence, and they do not appear in the record. The objections made to them in the letter of March 7th by Mr. Dodd are technical. We fail to find in this letter any statement of a material defect. Some of the objections are frivolous. Mr. Dodd and his principal fully understood that plaintiffs sent these as their proofs of loss. It was unnecessary to write a formal address to the defendant, or to state accurately the addresses of the other companies. The frivolity of some of the objections appears in his statement:

"There is nothing to show whether the fire was at 116 West Exchange street, or at 927 west side of North Washington street, or at the southwest corner of Washington and Exchange streets."

Defendant's agents knew the location, and to permit any such objection to defeat a valid claim would be a reproach to the law. The provision of the policy in regard to these proofs is as follows:

"If fire occur, the insured shall give immediate notice of any loss thereby in writing to this company, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, make a complete inventory of the same, stating the quantity and cost of each article and the amount claimed thereon, and within 60 days after the fire, unless such time is extended in writing by this company, shall render a statement to this company, signed and sworn to by said insured, stating the knowl-

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edge and belief of the insured as to the time and origin of the fire; the interest of the insured and of all others in the property; the cash value of each item thereof, and the amount of loss thereon; all incumbrances thereon; all other insurance, whether valid or not, covering any of said property, and a copy of all the descriptions and schedules in all policies; any changes in the title, use, occupation, location, possession, or exposures of said property since the issuing of this policy; by whom and for what purpose any building herein described, and the several parts thereof, were occupied at the time of the fire; and shall furnish, if required, verified plans and specifications of any building, fixtures, or machinery destroyed or damaged; and shall also, if required, furnish a certificate of the magistrate or notary public (not interested in the claim as a creditor or otherwise, nor related to the insured) living nearest the place of fire, stating that he has examined the circumstances, and believes the insured has honestly sustained loss to the amount that such magistrate or notary public shall certify."

The only objections entitled to any consideration are:

(1) That the policy requires a statement in the proofs of loss of "any changes in the title, use, occupation, location, possession, or exposures of the property since issuing the policy." It is manifest from this record that the title, use, location, and situation of the property were the same at the time of the fire that they were at the issuance of the policy, 44 days before; and it is a fair inference from the letter of March 7th that this was stated in the proofs of loss.

(2) That the proofs failed to show that the plaintiffs were the sole owners of the stock at the time of the fire. This is based upon the technical objection that the proofs were dated February 7th, and that the language is in the present tense. The fair inference is that both plaintiffs and defendant understood this to refer to the time of the fire.

We think there is enough upon this record to show that correct proofs of loss were furnished.

3. The policy provides for an examination of the insured under oath. Such an examination was demanded,

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and had February 25th to 27th. Upon that examination, plaintiffs, under the advice of their attorney, Mr. Miner, refused to produce their books showing the amount of sales since February 5th, and, under the like advice, refused to answer any questions concerning their business or sales since that date. They had bought other goods, mingled them with their old stock, and sold them. This conduct was in plain violation of the contract, and, if the result depended upon this, it would become a serious question whether it would not defeat recovery. This conduct, however, was clearly waived by subsequent proceedings. Negotiations were subsequently renewed. Plaintiffs, by appointment, went to Detroit, and, at the request of defendant, made a statement of their business, submitted it to the defendant, and offered to be questioned under oath. These things involved an expenditure of time and money, and, under our decisions, operated as a waiver of this and other defenses which are claimed. *Burnham* v. *Interstate Casualty Co.*, 117 Mich. 155, and authorities there cited. For the same reason, if there were any defects in the proofs of loss, they were waived. The court may have given a wrong reason, but its conclusion was correct. The result will not, therefore, be disturbed.

Other objections are raised, but, as they come within the above determination, we refrain from discussing them.

Judgment affirmed.

The other Justices concurred.

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STEVENSON v. DETROIT & MACKINAC RAILWAY CO.

1. NEW TRIAL—REFUSAL—BILL OF EXCEPTIONS.
   Under Act No. 184, Pub. Acts 1893, providing that there may be incorporated in the bill of exceptions a record of the proceedings on motion for a new trial, including the reasons for the refusal thereof, and that exceptions may be taken and error assigned thereon, the action of the trial court in refusing a new trial cannot be reviewed on appeal, if the bill of exceptions does not contain the order of refusal, the reasons therefor, and exceptions to the decision.

2. VERDICT—COERCION OF JURY.
   A verdict is not obtained through coercion or restraint because rendered as directed by the court, who charged the jury on Saturday afternoon that he was going home on the next train, and would adjourn court until Monday morning, and that, if they agreed upon a verdict, they should write it, and seal it in an envelope, and hand it to the sheriff, to be delivered to the judge when the court convened on Monday, and should then go to their homes, and return to their places in the court-room on Monday morning.

3. SAME—COMPROMISE—EVIDENCE—APPEAL—REVIEW.
   An objection that the evidence shows the verdict to have been a compromise verdict cannot be considered on appeal where the record does not purport to contain all the evidence.

4. SAME—IMPEACHMENT—STATEMENTS OF JURORS.
   An affidavit stating that the affiant was informed by several of the jurors that the jury at first stood three in favor of a verdict for the plaintiff and nine for the defendant, but that they were induced to agree upon a verdict for the plaintiff from the fact that, if they failed to do so, they would be compelled to stay over night in the jury-room, cannot be used to impeach their verdict.

Error to Iosco; Simpson, J. Submitted October 19, 1898. Decided December 6, 1898.

Case by Hattie Stevenson against the Detroit & Mackinac Railway Company to recover the value of a horse

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killed on defendant's track. From a judgment for plaintiff, defendant brings error. Affirmed.

Albert E. Sharpe, for appellant.

Charles A. Jahraus, for appellee.

LONG, J. Defendant's road runs through the plaintiff's farm. On May 7, 1896, plaintiff's horse was struck by defendant's train, and killed. Defendant contended on the trial that the horse was struck on the highway. Plaintiff contended that it was struck and killed on defendant's right of way, inside the cattle-guards. Defendant's right of way was not fenced; and the only question was whether the horse was in the highway, or not. Plaintiff recovered a judgment for the value of the horse at $75, and defendant brings error.

A record containing 28 pages is presented, which apparently contains a large part of the testimony, and also the charge of the court. It does not show any objections made, nor any exceptions taken, on the trial. Following the 28 pages is found a motion for a new trial and certain affidavits in support of the motion, as well as the assignments of error. The reasons given for asking a new trial are:

1. That the verdict was not in accordance with the evidence.
2. That the jury were induced to render a verdict for the plaintiff by improper motives, and by matters other than the consideration of the law and the evidence in the case.
3. That new and important evidence has been discovered.

All the assignments of error, except those relating to the charge, are based upon the order of the court denying the motion for a new trial; yet the record does not contain any such order. The record is entirely silent as to the order made by the court in the premises, or the reasons why the court denied the motion. There is nothing in

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this record for this court to review upon the motion for a new trial. Under Act No. 134, Pub. Acts 1893, providing that there may be incorporated in the bill of exceptions a record of the proceedings on motion for a new trial, including the reasons for the refusal thereof, and that exceptions may be taken and error assigned thereon, the action of the court cannot be reviewed in the absence from the bill of the reasons therefor and exceptions to the decision. *McRae* v. *Garth Lumber Co.*, 102 Mich. 488.

The assignments of error upon the charge may be considered. It appears that the court charged the jury at 2:30 o'clock on Saturday afternoon. Among other things, he said to the jury:

"Now, gentlemen of the jury, I am going home on this train; and if I go home on this train, and your verdict is not rendered, I shall adjourn this court until next Monday morning, at 9 o'clock; and I am going to give you this envelope and this piece of paper, and, if this court adjourns before your verdict is rendered, you will all write your verdict,—you will write your verdict on this paper, whatever you find, and all sign it, fold it up, and put it into this envelope, and seal it tight, if you agree, and hand it to the sheriff, to be delivered to me when court convenes on Monday; and you will return here Monday, and take your places in the court-room, and I will open your verdict, and receive it. You understand; I don't want any mistake about this. I say, if the court is adjourned before you agree, you will write your verdict,—just what you find,—all sign it right underneath the verdict, fold it up, and put it in here, and seal it, and hand it to the sheriff, and go to your homes, and return here Monday morning, at 9 o'clock, and I will."

It is claimed that the verdict was obtained through coercion and restraint of the jury. We cannot agree with this contention. The jury sealed their verdict, and returned it into court on Monday morning, as directed by the court.

But counsel says that the verdict was a compromise, as there was no testimony in the case that the horse was worth less than $100. This we are unable to ascertain,

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as the record does not purport to contain all the evidence.

Counsel also contends that this is shown by the affidavit used in the motion for a new trial. All this affidavit shows is that the affiant was informed by several of the jurors in the case that the jury at first stood three in favor of a verdict for the plaintiff and nine for the defendant, but that said jurors were induced to agree from the fact that, if they failed to so agree, they would be compelled to stay over night in the jury-room. If the affidavits of the jurors had been presented, they could not be used to impeach their verdict; and yet counsel contends that an affidavit made by one to whom the jurors communicated the facts may be used for that purpose. The facts set up in the affidavit are purely hearsay, and the affidavit cannot be used for the purpose presented.

The judgment must be affirmed.

The other Justices concurred.

ZINSER *v.* ANDERSON.

DEEDS—CANCELLATION—EVIDENCE.

A trust deed will not be set aside on the ground that it was made under duress or undue influence, or without knowledge that it was irrevocable, where an affidavit of the grantor two years after its execution, made in answer to a petition by his wife for an allowance of alimony, recites that, shortly after his marriage, he and his wife freely and voluntarily executed and delivered a deed of a large portion of his property in trust, to go to his children after his death, and that his only interest in the property is the net income derived therefrom.

Appeal from Kent; Adsit, J. Submitted October 20, 1898. Decided December 6, 1898.

Bill by John M. Zinser against William H. Anderson

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and others, to set aside a trust deed. From a decree dismissing the bill, complainant appeals. Affirmed.

L. E. Carroll (*Taylor & Eddy*, of counsel), for complainant.

Fletcher & Wanty, for defendant Anderson.

Thompson & Temple, for other defendants.

LONG, J. This bill is filed to set aside a certain trust deed made in September, 1892, by complainant and his wife to defendant Anderson, and to have the property reconveyed to complainant, on the ground that the deed was obtained by coercion and false representations in regard to the income of the property, and the representation that the complainant could at any time get the property conveyed by deed back; and he alleges that he had not learned until a short time prior to the filing of the bill that there was no provision in the trust deed which allowed him to have a reconveyance.

It appears that the complainant and his wife, Agatha, owned a considerable amount of property when she died, on March 28, 1892. Her estate amounted to some $16,000, and she left it in the hands of a trustee, to be divided among her nine children at the death of her husband, but provided that, in the event that he should give any considerable amount more, by will or otherwise, to any child, such an amount should be deducted from the share of that child so that the shares of their children from the two estates should be as nearly equal as possible. On the 6th day of September after the death of his wife, complainant remarried. The children were all opposed to this marriage; and, according to the testimony of complainant, they all treated him very badly when they discovered the marriage was to take place. The next day after the marriage, the children filed a petition in the probate court for a general and special guardian, alleging that the complainant had been drinking, that he was partially insane, and was under the influence and control of a woman of bad

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repute (meaning the wife of complainant), and that he was squandering his property. The citation was served on complainant. A meeting was thereafter had between him and the attorneys for the children, when it was agreed a trust deed should be made to defendant Anderson, by which the property should go to complainant's children after his death. The deed in question was thereupon drawn, and executed by complainant and his wife. This deed provides that the second party, Anderson, shall have full control and management of all of said property, and receive the rents and profits arising therefrom, during the natural life of John Zinser (complainant); that Anderson shall pay out of the rents and profits all taxes assessed on the property, all necessary insurance and repairs, and retain from said income a reasonable amount for his time and services in the management of the property, paying any and all balances that may remain at the end of each year to complainant for and during the period of his natural life; that, immediately after the death of complainant, the trustee shall sell and dispose of the property, and divide the proceeds among the children of complainant, the proportion to be paid to each being specifically set forth in the deed.

We think the testimony fairly shows that the complainant fully understood this deed, and the effect it had upon his property, as well as the proportion which each of his children would take. His counsel contend that the deed was executed (1) under duress; (2) while complainant was in poor health, and under the undue influence of others, and without legal advice; (3) without knowledge on the part of complainant that it was irrevocable. After the execution and delivery of the deed, the trustee entered upon the execution of the trust, and has continued to discharge those duties since. After the delivery of the deed, complainant and his wife moved to Traverse City, but did not live happily together. She filed a bill against him for divorce, and petitioned for an allowance of alimony, setting up in the petition that John M. Zinser was worth

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from $75,000 to $80,000. Mr. Zinser answered this bill, and resisted the payment of alimony. In answer to the petition he filed his own affidavit. This affidavit is dated November 16, 1894, being more than two years after the trust deed was delivered. In that affidavit he stated that it was not true that he was worth $75,000 to $80,000; "that it is true that, at the time of his marriage to said complainant, he had considerable property; and that, shortly after said marriage, said complainant and this deponent freely and voluntarily executed and delivered a deed of a large part or portion of said property, in trust, to go to defendant's children after his death, and that the only interest said defendant has in said property is the income derived therefrom after paying taxes and other expenses; that said property consists of a large block situated in Grand Rapids; that the same is now almost unproductive; and that this deponent has not for six months last past derived any income or returns from said property."

There is no evidence on this record of a convincing nature that this deed was executed under duress, while complainant was in poor health or laboring under great mental excitement, or that it was procured by undue influence; and the affidavit of the complainant, made more than two years after the deed, shows conclusively that it was made freely and voluntarily. This affidavit also rebuts any theory that counsel now advance that the complainant did not know that the deed was irrevocable.

There is some intimation in the brief of counsel for complainant that the trustee has not faithfully discharged the trust imposed. We find no proof in this record sustaining such a contention. He has so far accounted fully for the income of the property.

The court below very properly dismissed complainant's bill. That decree will be affirmed, with costs.

GRANT, C. J., MONTGOMERY and MOORE, JJ., concurred. HOOKER, J., did not sit.

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BIRDSALL *v.* BIRDSALL.

APPEAL—DECREE ON CONFLICTING TESTIMONY.

Where a chancery case turned entirely upon the credibility of the witnesses for the respective parties, whose proofs were in direct conflict, the finding of the circuit judge, who saw and heard the witnesses, was not disturbed.

Appeal from Kent; Grove, J. Submitted October 20, 1898. Decided December 6, 1898.

Bill by William H. Birdsall against Selina Birdsall for the specific performance of a parol contract for a lease of land. From a decree dismissing the bill, and granting defendant affirmative relief upon her answer in the nature of a cross-bill, complainant appeals. Affirmed.

William Birdsall died, testate, February 22, 1891, leaving a widow, the defendant, and five sons, including the complainant. He had made advances to all his sons, and, by his will, bequeathed the personal property to his wife, and the land, a farm of 80 acres, to her in trust, to have the use, income, and profit thereof for life; and also giving her the power to sell it if necessary for her support, and use the proceeds for that purpose. At her death, the farm, or, if sold, all the proceeds thereof unused, was to be divided among his five sons, in equal parts, except as to one, who, on account of the advancement to him, was to receive $1,000 less than each of the others. Previous to his death, he had leased the farm for two years to complainant, at a rental of $300 per year. After his death, and on April 1, 1891, defendant executed a new lease to complainant for three years for the same rental, on which he was to be allowed three dollars a week for his mother's support. Complainant alleges that he was running behind, and in 1893 informed defendant that he

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should leave the farm, and that thereupon he made with her the agreement which he now seeks to enforce. This agreement is set forth in the bill of complaint in the following language:

"Said Selina Birdsall proposed to your orator that he try the experiment of raising fruit upon a portion of said farm, and did then and there orally agree with your orator that in case he would remain on said farm, and renew his said lease, and would buy, pay for, plant, and care for, until their bearing period was reached, such a quantity of peach, pear, and cherry trees as he, your orator, saw fit to, that the same might be set out on the said farm, and should belong to, and be the absolute property of, your orator, and that she would renew her said lease to your orator from time to time during her natural life, for the same rental and on the same terms as the first lease so made from her to him as aforesaid, and that upon her death the said orchard should be the property of your orator."

Complainant alleges that he performed the agreement, and set out some 982 fruit trees, which cost $166, and took care of them until he was ejected from the premises, in 1897. He alleges that this agreement was made in the fall of 1893.

The defendant answered, denying all the material allegations of the bill, except that she ordered herself 100 cherry trees to be delivered in the spring of 1894, and asserts that she objected to the planting of the peach and pear trees.

Proofs were taken in open court, and the learned circuit judge found the facts and entered a decree as follows:

"That the complainant did, in the spring of 1894 and spring of 1895, set out upon the land of said defendant, Selina Birdsall, described in the bill of complaint filed herein, a cherry, peach, and pear orchard, of which there are now living and growing upon said premises 158 pear, 105 cherry, and 667 peach trees, of which peach trees 420 were set out in the spring of 1894, and 247 in the spring of 1895; that the value of said orchard is from $600 to $1,000; that in the spring of 1893 there were some peach trees heeled in upon the premises of said defendant, which

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said defendant supposed said complainant intended to set out upon her said place, and that, so supposing, she did at that time serve written notice upon said complainant, forbidding him from setting out said peach trees upon her said premises, and that the said complainant did thereafter set the same out upon a farm of his own, in the town of Walker, and disclaimed having any intention of setting the same out upon the premises of said defendant; that in the fall of 1893 the said defendant, at the suggestion of a fruit-tree agent, who was then at her house, ordered 100 cherry trees, to be delivered in the spring of 1894, and that at the same time, but without the knowledge of said defendant, said complainant ordered the said pear trees and the greater part of the said peach trees, and said trees, including said cherry trees, were delivered to said complainant in the spring of 1894, and were brought by him to the premises of said defendant, and there heeled in, and the said complainant thereupon commenced to plow and prepare the ground for the setting of said trees; that the first notice or knowledge that said defendant had of the purchase of said trees by said complainant was when they were so heeled in, and the first notice or knowledge that said defendant had that said complainant intended to set said trees, other than said cherry trees, upon her said premises, was when he began to plow and prepare the ground therefor; that she at that time, and before he had set any of said trees, inquired of him, and was informed by him that he was going to set said peach and pear trees upon her land, and she thereupon forbade him from so doing, and told him not to do so; that he at the same time asked her to sign a paper saying the trees should be his, which she refused to do, and informed him, if he set them on her land, he did so at his own risk; that complainant proceeded to set said orchard, without the consent of said defendant; and that again, in December, 1894, the defendant, hearing that said complainant intended to set more trees upon her said premises, served another written notice upon him, forbidding him from so doing, and, after receiving such notice, complainant proceeded to set other and additional trees in said orchard, to the number of about 250 peach; and that defendant has never given her consent to the setting of any of the trees in the orchard claimed by complainant herein, except the said 100 cherry trees, which defendant did not have the money to pay for at the time they were delivered, and requested complain-

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ant to pay for the same, he being indebted to her at that time, and she expecting to apply the amount paid therefor, namely, $30, upon said indebtedness, and is still willing so to do. I further find that the said complainant is indebted to the said defendant upon various notes to the sum of $500 or thereabouts, not including the rent from the 1st of April, 1897.

"The principal reason that said defendant objected to the setting of said trees was that she expected that after her death the premises would go, in accordance with her husband's will, to her five sons, and she feared, if the orchard was set upon the premises, that it might lead to disagreement and difficulty, and possibly to litigation, between her sons after her death.

"It is therefore hereby ordered, adjudged, and decreed that the complainant's bill be, and the same is hereby, dismissed, with costs to said defendant to be taxed. And the said defendant, Selina Birdsall, having prayed affirmative relief in her answer in the nature of a cross-bill filed herein, and due consideration thereof having been had, it is further ordered, adjudged, and decreed that the said defendant, Selina Birdsall, is entitled to the possession of the premises described in said bill of complaint, and that the said complainant restore to the said defendant, Selina Birdsall, the possession of the same upon her demand, and, in case of failure so to do upon demand, that a writ of restitution of the possession of said premises be issued from this court, in favor of said defendant, Selina Birdsall, and against said complainant, upon proper application being made therefor; provided, that, at her option, said defendant, Selina Birdsall, may institute summary proceedings to recover the possession of said premises, the same as though the writ of restitution had not been decreed herein."

Everett D. Comstock (*Birney Hoyt* and *S. D. Clay*, of counsel), for complainant.

Walker & Fitzgerald, for defendant.

GRANT, C. J. (*after stating the facts*). After the date of this alleged agreement, complainant asked defendant for a lease for six years. She refused, and on April 10, 1894, made a new lease for three years. This

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lease is in the usual form, and contains no reference whatever to the alleged agreement. It provided that the death of the defendant should terminate the lease. She was then over 70 years of age, and testified that she did not anticipate that she should live long, and feared that the planting of the orchard would make trouble among her sons. We find it unnecessary to determine whether the proofs on the part of the complainant show a definite, complete, and certain contract, capable of enforcement. The proofs of the respective parties are in direct conflict, and the conclusion reached by the circuit judge depends upon the credibility to be given to the witnesses. The circuit judge saw them, heard their testimony, and made a finding of facts. There was ample evidence on the part of the defendant to sustain the finding. We see no reason to discredit the conclusion reached by the circuit judge. A detail of the evidence would be profitless, and would neither serve any good purpose nor form any precedent in other cases. We think the judge reached the correct conclusion, and the decree is affirmed, with costs.

The other Justices concurred.

FREEBORN *v.* LA LONDE.

SUMMARY PROCEEDINGS—ACTION BY LESSEE.

A lessee of land to whom the owner refuses possession under the lease cannot maintain summary proceedings under 2 How. Stat. § 8295, to recover such possession,—at least not until the estate of the owner, as a tenant at sufferance, has been determined by notice to quit.

Case made from Chippewa; Steere, J. Submitted October 20, 1898. Decided December 6, 1898.

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Summary proceedings by William J. Freeborn against Charlotte La Londe and John F. Moloney to recover the possession of lands. The circuit judge directed a verdict for defendants, and complainant assigns error. Affirmed.

John W. Shine (*L. C. Holden*, of counsel), for appellant.

M. F. McDonald, for appellees.

MONTGOMERY, J. This is a summary proceeding to recover possession of a store building. The proceeding was commenced before a circuit court commissioner, and on appeal to the circuit court a verdict was directed for the defendants, and complainant assigns error.

The defendant Charlotte La Londe is the owner of the premises in question. The evidence adduced on the part of the complainant tended to show that on the 18th of January, 1898, Mrs. La Londe, through her son acting as her agent, made a lease of the premises in question to complainant for one year, commencing February 1, 1898; that, before he acquired possession, Mrs. La Londe leased the premises in question to the defendant Moloney, who moved in and took possession on the 22d of January. On the 1st of February, complainant demanded possession, and, upon defendants' refusal, instituted this proceeding.

At the close of the testimony, the circuit judge charged the jury that the statute does not contemplate putting the tenant into possession of lands which he has leased, and which the landlord refuses to give to him, and that the lessee of lands who has not been in possession of them cannot institute proceedings under the statute to compel the landlord to give him possession, and directed a verdict for the defendants. It is contended that this was error; that the lessee, although not let into possession, has such an interest in the premises as will entitle him to recover possession; and, second, that such possession can be recovered in a summary proceeding under the statute. We

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find it unnecessary to determine the first of these propositions. The statute (2 How. Stat. § 8295) limits the remedy by summary proceedings. Unless the facts of this case bring it within the provisions of that statute, the remedy of the complainant must be either by an action for damages or ejectment.

But two of the subdivisions of the statute can by any stretch be said to have any application. They are the first and fourth, which read as follows:

"When any person shall hold over any lands or tenements after the time *for which they are demised or let* to him, or to the person under whom he holds, or contrary to the conditions or covenants of any executory contract for the purchase of lands or tenements, or any lease or agreement under which he holds, or where rent shall have become due on any such lease or agreement, and demand of the rent or possession of the premises is waived therein in writing, and not included in the printed form of the lease or agreement."

"When any tenant at will or by sufferance shall hold over after the determination of his estate by a notice to quit, as provided by law."

This case does not fall within the first subdivision. The defendant La Londe is not holding over after the time for which the *premises were demised or let to her*, or contrary to the conditions or covenants of a contract for the purchase of lands or tenements, or of any lease under which she holds. It may be contended that, by her failure to deliver possession at the time stated, she, through her tenant, Moloney, is holding the premises contrary to her agreement to let or lease. But it is not a lease under which *she holds*. She holds and has held possession as the owner of the title. She was not vested with possession under this lease, and cannot be said to hold under this lease, or to have ever held thereunder. This distinguishes this case from *Gale* v. *Eckhart*, 107 Mich. 465, in which case the grantor reserved the right of possession until April 1, 1894, and became a tenant of the purchaser.

Counsel contend that the defendants became tenants

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at sufferance when possession was withheld. If this be granted, it does not aid complainant. If the defendants are tenants at sufferance, they are not holding over "after a determination of their estate by a notice to quit." It is contended that a person holding over at sufferance is not entitled to a notice to quit unless he is permitted to retain possession by the owner or one entitled to possession. The cases of *Allen* v. *Carpenter*, 15 Mich. 25, and *Benfey* v. *Congdon*, 40 Mich, 283, are cited to support this contention. This is unquestionably the doctrine of the cases cited, but in these cases the complainant was in each case entitled to invoke the statute by virtue of other provisions. Neither case is authority for the position that a summary proceeding may be instituted against a tenant at sufferance unless he holds over after notice to quit, unless, under other provisions of the statute, jurisdiction is conferred. The statute cannot be extended by construction. 9 Enc. Pl. & Prac. 45.

The circuit judge was right in directing a verdict for the defendants.

Judgment affirmed.

The other Justices concurred.

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LAMB *v.* RATHBURN.

1. SETTLEMENT—CONFLICTING CLAIMS.
   A settlement of conflicting claims, made with full knowledge of the facts, is conclusive upon the parties.

2. APPEAL—QUESTIONS NOT RAISED BELOW.
   Where, in an action between landlord and tenant, the claim is made that a payment of certain moneys under the lease was through mistake, and the case is presented to the jury upon that theory, the further claim that the payment was under duress, asserted for the first time on appeal, cannot be considered.

3. LANDLORD AND TENANT—SETTLEMENT—DURESS.
   A settlement between a lessor and lessee of the amount due for rent is not void for duress because, by the terms of a chattel mortgage given by the lessee to secure the rent, he was prohibited from moving the mortgaged goods to another township, in which he had rented another farm, where nothing was said during the settlement about the mortgage, nor any statement made by the lessee that he paid the disputed amount in order to release his goods.

4. SAME—CONTRACTS—CONSIDERATION—EVIDENCE.
   By the terms of a five-year lease, the tenant was to pay an annual rent of $450. At the end of the first year, the tenant informed the landlord that he would be obliged to give up his lease, but consented to remain upon the landlord's promising a reduction of $50 in the rent. The $50 was deducted each year until the last year. The lease required the tenant to secure the rent each year by a chattel mortgage. The landlord promised the same reduction for the last year if the wife of the tenant would sign the mortgage, which she did accordingly. *Held*, that the agreement to reduce the rent was not without consideration.

Error to Livingston; Smith, J. Submitted October 21, 1898. Decided December 6, 1898.

Assumpsit by Charles Lamb against Adelbert Rathburn to recover an amount due under a lease. From a

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judgment for defendant upon the allowance of a set-off, plaintiff brings error. Reversed.

In January, 1892, plaintiff leased the defendant his farm for five years. The rent was $450 per year, but, if paid on the 1st day of March each year, to be $400. The lease also required defendant to execute to plaintiff, on or before the 1st day of March each year, a chattel mortgage upon the growing crops, and other personal property of sufficient value to secure payment of the rent for the current year. Mortgages were executed accordingly. At the expiration of the term, the parties settled, defendant paying plaintiff $564.19. Defendant agreed to furnish clover seed for seeding the ground put in to wheat. At the time of the settlement, a dispute arose as to the amount of land to be thus seeded, and for which defendant had not provided the seed. Defendant gave an order to plaintiff on one Simmonds for the clover seed, the amount to be subsequently determined. The cost of this seed was $23, for which plaintiff brought this suit in justice's court. Defendant admitted his liability for $23, but claimed a set-off for $50. The jury allowed the set-off, and rendered a verdict for defendant for the difference.

Clarence Tinker, for appellant.

Louis E. Howlett, for appellee.

GRANT, C. J. (*after stating the facts*). 1. At the settlement, defendant insisted that he owed the plaintiff $514.19. The dispute between them was over $50. It is unnecessary to state details. The settlement was made with the full knowledge of the claim of each party in regard to it. There was no mistake. It was therefore error for the court to instruct the jury that, if defendant paid the money by mistake, he was entitled to recover it back.

2. Defendant urges that he paid it under duress, and cites *Hackley* v. *Headley*, 45 Mich. 569. A complete

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reply to this claim is that this theory of the case was not submitted to the jury. The charge of the court is given in full, and does not refer to such theory. But, under the facts, plaintiff made no threat, and, under his claim, stood simply upon his legal rights under the lease and mortgages. Defendant testified he (plaintiff) "insisted that this $50 should be paid. I insisted that it should not. Mr. Lamb went away to work. I went after him. He came back. I told him to come back, and we would fix it up. I then paid him the amount." On redirect examination he testified: "I paid it so that I could get my stuff released. I had taken Jubb's farm, and I couldn't move." By the terms of the mortgage, defendant was prohibited from moving the mortgaged goods out of the township. Nothing was said during the settlement about the mortgage, or any statement made by defendant to plaintiff that he paid the disputed amount in order to release his goods. Under this state of facts, there was no duress.

3. Defendant gave evidence tending to show that during the first year his crops were poor; that he was unable to pay the rent, and that he informed plaintiff that he should leave the farm and give up the lease; that plaintiff promised him that, if he would remain, he would reduce the rent $50 per year; that defendant accepted the proposition; that for four years the $50 was deducted, which plaintiff admitted; that, when the chattel mortgage was given during the last year, plaintiff procured the signature of defendant's wife to the mortgage, thereby obtaining a security which the lease did not provide for; that the mortgage was for the $450; and that, in consideration of his wife's signature, plaintiff promised to deduct the $50 when the last payment was made. It appears to have been deducted for the other years when the first payment was made. Under these circumstances, we think there was evidence of a consideration for the reduction of the rent. *Moore* v. *Detroit Locomotive Works*, 14 Mich. 266; *Goebel* v. *Linn*, 47 Mich. 489 (41 Am. Rep. 723);

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Lawrence v. *Davey*, 28 Vt. 264; *Connelly* v. *Devoe*, 37 Conn. 570; *Rollins* v. *Marsh*, 128 Mass. 116; Clark, Cont. 187.

Judgment reversed, and new trial ordered.

The other Justices concurred.

LAWTON *v.* RICHARDSON.

LABOR DEBTS—WHAT ARE—STORE EMPLOYÉS.

Debts due to employés in a dry-goods store, who act as department managers and salesmen, and perform such services as the unpacking of goods, marking them and placing them upon the shelves, sweeping out the store, and keeping the stock in order, are debts for labor, within the meaning of 3 How. Stat. § 8749*m*, making labor debts preferred claims under certain circumstances.[1]

Appeal from Wayne; Donovan, J. Submitted October 21, 1898. Decided December 6, 1898.

Bill by Edward Lawton and others against Henry W. Richardson, John Phillips, Thomas E. Hall, William B. Hall, and Emma H. Hall, to enforce certain labor claims under 3 How. Stat. § 8749*o*. From a decree for complainants, defendants Hall appeal. Affirmed.

Hatch, Hatch & Chapman, for complainants.

A. G. Pitts and *J. G. Dickinson*, for appellants.

MOORE, J. Henry W. Richardson was a dry-goods merchant in Detroit. The other defendants are his credit-

[1] On the question who are employés, laborers, or servants, within the meaning of statutes giving preferences, there is an extensive note to *Tod* v. *Kentucky Union R. Co.*, (C. C. App.) 18 L. R. A. 805.

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ors, who took possession of some of his stock, either as mortgagees or attaching creditors. Mr. Richardson at this time owed complainants, who were in his employ. They claimed the debts due them were owing for labor, within the meaning of 3 How. Stat. § 8749*m*. By grouping their claims together, they amounted to more than $100. It is their claim that their hiring by Mr. Richardson, and the subsequent transactions connected with the closing of his business, entitled them to the relief provided by sections 8749*m*, 8749*o*. After hearing the proofs in open court, the circuit judge found the averments of the bill to be true, and rendered a decree in favor of complainants.

The important question involved is: Were there debts owing for labor, to the amount of $100, due complainants? The appellants say not, citing *Jones* v. *Avery*, 50 Mich. 326; *Black's Appeal*, 83 Mich. 520; *Sayles' Petition*, 92 Mich. 354; *Clark's Appeal*, 100 Mich. 448. The record shows Mr. Richardson proposed to engage in business in Detroit, and advertised for a salesman and manager for a dry-goods store. Mr. Lawton met him at the Russell House, and was told by Mr. Richardson that he had $18,000 with which he was going to buy goods. Mr. Lawton hired out to him July 25th, for $75 a month, expecting to be the manager of the store. He went to work July 27th, helping to get the store ready for business. In August, Mr. Lawton and Mr. Richardson went East, and bought the goods. August 22d, Mr. Lawton returned to Detroit, helped unpack the goods, and helped about the marking of the goods, putting them upon the shelves, and getting the stock ready for the opening day. After that he did the work of an ordinary clerk, helping about selling the goods, sweeping out the store, and doing the general work of the store. Mr. Richardson, at the time of the employment, asked Mr. Lawton to furnish $250 as security for the proper performance of his work. It was furnished to Mr. Richardson, and never returned. It does not form any part of the decree rendered by the cir-

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cuit judge. Mr. Burkard also answered the advertisement, and had an interview with Mr. Richardson at the Russell House, when he was told substantially the same thing by Mr. Richardson that had been told Mr. Lawton. He also was asked to furnish $250, but did not do so, and was hired to help in the dress-goods department, at $14 a week. The keys of the store were given to him by Mr. Richardson, and at his direction he opened the store in the morning early enough so the carpenters could go to work, got a carpenter to make shelving and railing, and gave instructions about putting in the store a desk, shelving, and counters. He opened up 60 or 70 cases of goods when they came, and carried them into the store, sometimes working at night to do so. He also helped mark the goods, and put them on the shelves, and helped sweep the store every morning, and helped about keeping the stock in order, including the display of the goods outside, and had charge of the dress-goods department. The other complainants were clerks, working for five and six dollars a week.

The store was closed about September 24th by the creditors, either by commencing replevin and attachment suits, or by mortgagees taking possession. Emma H. Hall is the mother-in-law of Mr. Richardson, and Thomas E. and William B. Hall his brothers-in-law.

The circuit judge found that, as to the work done by Mr. Lawton when in New York, it was not the work of a laborer, within the meaning of the statute; but as to the other work done by him, and the work done by the other complainants, it was labor, within the meaning of the statute. It is apparent from what has already appeared that nearly all the labor done was not intellectual or professional in its character, nor was it of an especially skillful kind. It was, in the main, manual labor, and of such a character as the statute was intended to protect. *Black's Appeal*, 83 Mich. 520.

The decree is affirmed, with costs.

The other Justices concurred.

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AVERY *v.* BURRALL.

1. SALE—GUARANTY—HEATING PLANT—MANAGEMENT—EVIDENCE.
Plaintiff guaranteed the heating capacity of certain boilers sold by him to defendant when operated with soft coal. In an action for the purchase price, defendant claimed that the boilers required hard coal to be used, and sought to recoup her damages. Plaintiff contended that the failure of the boilers to give satisfaction was due entirely to mismanagement on the part of defendant, and introduced, as bearing upon this issue, the testimony of witnesses who were successfully operating the same kind of boilers with soft coal. *Held*, that the testimony was competent for the purpose offered.

2. SAME—RECOUPMENT—BURDEN OF PROOF.
The burden of showing that a steam-heating plant does not meet the requirements of the contract of purchase is upon the vendee in an action against her to recover the balance of the purchase price, where she has accepted and used the plant, and seeks to recoup in the action the amount of her damages for its failure properly to perform the work.

Error to Jackson; Peck, J. Submitted October 21, 1898. Decided December 6, 1898.

Assumpsit by Howard H. Avery and another against Emily M. Burrall for installing a steam-heating plant. From a judgment for plaintiffs, defendant brings error. Affirmed.

Blair, Smith & Townsend (*Wilson & Cobb*, of counsel), for appellant.

John W. Miner (*Grove H. Wolcott*, of counsel), for appellees.

MOORE, J. Plaintiffs recovered a judgment for putting a steam-heating plant into the Webb Block, in Jackson, and for doing extra work connected therewith, for the

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defendant. Those portions of the contract necessary to appear here for a correct understanding of the case read as follows:

"That the parties of the first part hereby agree to construct the steam heating, gas fitting, and plumbing in the Webb Block, now under construction on the west side of Mechanic street, in the city of Jackson, as hereinafter specified, for the sum of $1,846.55, to be paid by the party of the second part in such sums or amounts up to 90 per cent. of the cost of materials and labor that may be placed on the premises, or at the place of business of the parties of the first part, the remainder to be paid at the completion of work contracted to be done; said parties of the first part to furnish a good and sufficient bond, in the sum of $2,000, guaranteeing the fulfillment of the contract, and the successful heating of said block to a temperature of 70 degrees Fahrenheit when tested thermometers register a temperature of 10 degrees below zero on the outside. The conditions of this agreement are as follows: * * * *Steam Boilers:* Furnish and set up in boiler-room three No. 28 D. H. & L. steam boilers for burning soft coal, connected in battery, so that any one or all can be used at the same time, with complete sets of trimmings and firing tools. * * * *Guaranty:* We guarantee all material and workmanship used in the construction of this heating plant to be the best of their respective kinds, and the apparatus, as a whole, to be capable of warming all rooms in which radiators are placed to the temperature of 70 degrees Fahrenheit when the temperature is 10 degrees below zero on the outside, provided that coal suitable to the requirements of the heaters is used, and the heaters properly managed."

During the progress of the work, defendant paid plaintiffs $1,800. After plaintiffs claimed the plant was completed, defendant used it, but claimed it did not meet the requirements of the contract. The parties were unable to arrive at a settlement, and this suit was brought. The declaration set up the making of the contract by the parties, its completion by the plaintiffs, and the failure of defendant to pay. It also contained all the common counts in *assumpsit*. Defendant pleaded the general issue, and

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gave notice that the plant would not do the work required to be done by the contract; that it was necessary to use hard coal instead of soft coal, at great additional expense, and that the heating system must be changed at great expense; that the work was improperly done,—and claimed damages by way of recoupment to the amount of $2,000. Upon the trial it was the claim of defendant that the boilers would not heat the building when soft coal was used, and that it was necessary to use hard coal. It was the claim of plaintiffs that if the boilers were properly stoked, and the flues properly cleaned, and proper soft coal used, the boilers would perform the work satisfactorily. Both parties gave testimony tending to show the truth of their respective claims.

The first assignment of error necessary to be discussed relates to the admission of testimony of a witness who testified to the successful working of other No. 28 D. H. & L. boilers when burning soft coal. Appellant claims it was error to admit this testimony, arguing that the fact that other like boilers worked well would not prove or tend to prove that these particular boilers worked well, or that they were not properly treated; citing *Second National Bank* v. *Wheeler*, 75 Mich. 546. It is undoubtedly true, as stated in the case just cited, that it would not follow that, because one machine did good work, another similar to it would also do good work, and the court so stated when he admitted the testimony, and he allowed the testimony only for the purpose of showing the kind and character of the fuel necessary to be used, and the kind and character of management necessary. We think the testimony, with the limitation put upon it by the judge, was competent. It was the claim on one side that the boilers were properly managed, and upon the other side that they were not, and that question was passed upon by the jury in arriving at their verdict.

The judge, after charging the jury about the questions involved in the case, charged them as follows:

"Now, gentlemen, with these preliminary instructions

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upon that branch of the case, you will be prepared to take up or consider the question as to whether or not this guaranty has been, in either of its respects, violated by the plaintiffs,—be able to take up and determine whether or not the guaranty of condition, quality, and efficiency was true or false. Upon this branch of the case, the defendant, Mrs. Burrall, has the burden of proof, and is not entitled to prevail unless she has satisfied you by a preponderance of the evidence that the guaranty was not true,—that it was broken. Now, this involves proof of these propositions, which are included in the conditions of the guaranty: *First*, that the material and workmanship used in the construction of said heating plant was not the best of their respective kinds, as provided in the contract; *second*, that the apparatus as a whole is not capable of warming all the rooms in the building to a temperature which the guaranty provides, when suitable coal is used and the heaters properly managed. Now, gentlemen, if neither one of these propositions has been established by the defendant by a preponderance of the evidence, you should consider that the defendant has failed to establish her contention upon this branch of the case, and make up your verdict accordingly. On the other hand, if one or both of these propositions has been established by the evidence, and a preponderance of it, you should consider the guaranty as untrue,—broken,—and the defendant would be entitled to be credited in your verdict with the damages which actually and necessarily resulted from that cause. Now, gentlemen, if the defendant prevails upon this branch of the case, you should award her such damages as, under the evidence and the rules of law now given you, she would be entitled to."

The defendant says this case is not the ordinary case of warranty upon sale of an article, but is one of condition clearly expressed by the contract upon which the suit is brought, and a substantial performance of such contract must be shown before plaintiffs can recover, and that the burden of proof is with plaintiffs to show the plant is properly constructed, and meets the requirements of the contract. If there had been no acceptance of the work by defendant, there would be much force in this contention; but the defendant has taken possession of the plant, and used it, and still uses it. When called upon to pay for it, she

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assigns as a reason why she should not do so that it does not perform its work as it ought under the contract; that she has been damaged by this failure; and seeks to recoup in this action the amount of her damages. To establish this defense requires proof. Having taken the property and used it, manifestly she should pay for it, unless there is some legal reason which she can show which shall relieve her from that duty. The rule is stated in Benjamin on Sales (section 564) as follows:

"Although a man may refuse to perform his promise till the other party has complied with a condition precedent, yet, if he has received and accepted a substantial part of that which was to be performed in his favor, the condition precedent changes its character, and becomes a warranty or independent agreement, affording no defense to an action, but giving right to a [counter] claim for damages. The reason is that it would be unjust, under such circumstances, that a party who has received a part of the consideration for which he bargained should keep it, and pay nothing, because he did not receive the whole. The law, therefore, obliges him to perform his part of the agreement, and leaves him to his action of [or counterclaim for] damages against the other side for the imperfect performance of the condition."

We think the court did not err in his statement of the rule. 5 Am. & Eng. Enc. Law (2d Ed.), 26, note, "Recoupment;" *The Propeller Burlington*, 137 U. S. 386; *Day* v. *Raguet*, 14 Minn. 273; 1 Greenl. Ev. § 74; *Tousignant* v. *Shafer Iron Co.*, 96 Mich. 87; *Farrell* v. *School District*, 98 Mich. 43; *Dillon* v. *Pinch*, 110 Mich. 149.

Error is assigned upon statements of counsel made during the progress of the trial. It would have been well to have omitted these statements, but they were not of such character as would tend to prejudice defendant's case. Error is also assigned upon other portions of the charge of the judge. We have carefully examined them, but we do not deem it necessary to discuss them, as we do not deem them well taken.

Judgment is affirmed.

The other Justices concurred.

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LAFLER v. MONROE CIRCUIT JUDGE.

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CIVIL DAMAGES—SALOON-KEEPER'S BOND—JOINT ACTION—REMISSION OF JUDGMENT.

An action for civil damages against a saloon keeper and his bondsmen is joint, and a remission by plaintiff of so much of a judgment recovered in such action as is in excess of the penalty of the bond inures to the benefit of the principal as well as of the sureties.

Mandamus by Martha E. Lafler to compel Edward D. Kinne, circuit judge of Monroe county, to enter an order reforming a judgment. Submitted November 7, 1898. Writ denied December 6, 1898.

John O. Zabel and *C. A. Golden*, for relator.

Watts, Bean & Smith (*Landon & Lockwood*, of counsel), for respondent.

PER CURIAM. The plaintiff recovered a judgment in the Monroe circuit court against one Fisher, a saloon keeper, and his bondsmen, in the sum of $5,000. The penalty of the bond was but $3,000. The defendants moved for a new trial, and the court ordered that a new trial be granted unless the plaintiff remit down to the penalty of the bond. The plaintiff, on the hearing of the motion, asked for judgment for $3,000 against the sureties, and for the amount of the verdict, $5,000, against the principal. This application was denied, and *mandamus* is now sought to compel the circuit judge to enter such order.

The action is joint. A satisfaction by one defendant would discharge the action. There is no provision of statute for severing in an action *ex delicto*, or for entering a judgment in one sum against one defendant, and in a greater sum against another.

The writ is denied.

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BROWN *v.* JUST.

1. WILLS—APPOINTMENT OF EXECUTOR—DELEGATION OF POWER.
   The common-law right of a testator to delegate the power to choose his executor has not been abrogated by statute in this State.

2. SAME—CONSTRUCTION.
   A clause in a will, "I make no selection of an executor of this will, but leave it for the judge of probate who may be acting when this will becomes operative to make an appointment of some suitable person for that purpose," confers upon the judge of probate the power of such appointment.

3. SAME—NOMINATION BY NEXT OF KIN.
   3 How. Stat. § 5849, providing that administration of the estate of a person dying intestate shall be granted to the widow or next of kin, or both, or such person as they may request to have appointed, if suitable and competent to discharge the trust, does not apply where the deceased left a will authorizing the judge of probate to appoint some suitable person as executor.

4. SAME—PROPERTY RIGHTS—WHEN DETERMINED.
   Upon an issue as to whether a testator made a valid delegation to the probate judge of the power to appoint an executor of the will, the alleged want of interest of the persons who support the right of the executor appointed by the probate court as against the nominee of the next of kin cannot be considered; the determination of property rights pertaining, not to the probate of the will, but to the distribution under it.

5. SAME—EXECUTORS—DEFENSE OF AUTHORITY.
   An executor, whether named in the will or by delegated power, has the right to defend in the courts his authority to act.

Certiorari to Ionia; Davis, J. Submitted November 23, 1898. Decided December 6, 1898.

Leonard H. Merrifield, a legatee under the will of Curtis Merrifield, deceased, petitioned for the probate of said will, and the appointment of William J. Just as

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administrator with the will annexed. The probate court appointed Charles Brown as executor, and an appeal was taken to the circuit court, where the order of the probate court was reversed and the prayer of the petition granted. Charles Brown brings *certiorari*. Reversed, and order of the probate court affirmed.

Curtis Merrifield died testate. By his will, he gave to his wife absolutely certain described personal property, and one-half of all his other personal property, the use of the other half for life, and at her death one-half thereof to his nephew, one-fourth to his niece, and the other fourth to one Elizabeth Bradley. He had real estate, of which no mention is made in the will. His wife died on the 9th, and he on the 13th, of January, 1898. He had no children, and the nephew and niece were his sole heirs. On January 24th, the nephew filed a petition for the probate of the will, and the appointment of William J. Just, or some other suitable person, as administrator with the will annexed. The will contained the following clause:

"I make no selection of an executor of this will, but leave it for the judge of probate who may be acting when this will becomes operative to make an appointment of some suitable person for that purpose.

Upon the hearing, the probate court appointed the plaintiff. Defendant took an appeal to the circuit court, which reversed the order of the probate court, and appointed defendant. From this order, the plaintiff has brought the case to this court by the writ of *certiorari*. Testimony was offered and received to show that the deceased, shortly before his death, expressed a desire that Mr. Brown should settle his estate.

V. H. & H. H. Smith (*Allen B. Morse*, of counsel), for plaintiff in *certiorari*.

A. A. Ellis, for defendant in *certiorari*.

GRANT, C. J. (*after stating the facts*). It is con-

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ceded that at the common law a testator may delegate to another the power to choose his executor. Two questions are therefore before us for determination: (1) Does the statute take away this power of delegation? (2) Does the language of the will amount to a delegation of the power?

1. It is urged that our statute makes no provision for the appointment of an executor unless actually named in the will. This point was raised in *Hartnett* v. *Wandell*, 60 N. Y. 346 (19 Am. Rep. 194). It was held that the statute of that State did not abrogate the common-law power to delegate the appointment. There is nothing in our statute which shows any intention to abrogate it. There is no difficulty in carrying out the will of the testator in such case, and the probate court contains all the machinery necessary for the purpose. There may be good reasons in the mind of a testator for not making the designation himself. The person appointed by the will might die before the probate of the will, and for this reason he might choose to repose the power in some prudent person, as the judge of the court having authority in such matters. Such right cannot be held to be abrogated except by express enactment or by necessary implication. Neither is found in our statute.

2. We are of the opinion that the will conferred upon the judge of probate the power of appointment. One of the definitions of the word "leave" is "to confide, commit, or refer." Cent. Dict. We find no case involving a provision identical with this. The case, *In re Goods of Cringan*, 1 Hagg. Ecc. 548, contained the following provision: "It is left to the legatees mutually to appoint two intelligent and trustworthy persons to execute this deed." The power to thus appoint was sustained. See, also, *State* v. *Rogers*, 1 Houst. 570.

It is, however, urged that the language of the will was used with reference to the statute, which provides that administration of the estate of a person dying intestate shall be granted to the widow or next of kin, or both, or

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such person as they may request to have appointed, if suitable and competent to discharge the trust. 3 How. Stat. § 5849. This statute applies solely to cases where persons die intestate, or have left wills without any provisions for the appointment of executors, and not to cases of delegated authority.

3. Counsel also contends that the real parties attempting to sustain the appointment of Mr. Brown are the heirs of Mrs. Merrifield, and that, she having died first, the personal property bequeathed to her is intestate, and therefore they have no interest in the estate. In support of this, counsel cites *Allison* v. *Smith*, 16 Mich. 405. In that case a college was the residuary legatee. The statute required such wills to be executed at least two months prior to the death of the testator. The question was whether the will was executed in accordance with the statute. It was held that this question properly arose upon the hearing for the probate of the will, and not upon the distribution of the property under it. No such question is here presented. All concede that this will was properly executed, and should be probated. The sole question is, Who is entitled to execute a valid will? The property rights under it will arise for determination during its execution, but cannot be litigated in this proceeding. *In re Nugent's Estate*, 77 Mich. 503.

A further reply to this contention is that Mr. Brown is entitled to defend his right of appointment; and, while the same attorneys who appear for the heirs of Mrs. Merrifield appear also for him, there is nothing to indicate that he is acting in collusion with them, or that he is not in a legitimate manner seeking to defend his own right. An executor, whether named in the will or by delegated power, has the right to defend in the courts his authority to act.

The judgment of the circuit court will be reversed, and the order of the probate court appointing Mr. Brown affirmed. Let it be so certified to the probate court.

The other Justices concurred.

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ATTORNEY GENERAL, *ex rel.* MOORE, *v.* AMERICAN EXPRESS CO.

1. COURTS—JURISDICTION—WAR-REVENUE TAX.
   State courts have jurisdiction of a proceeding to compel an express company to receive and forward goods tendered to it by a patron, which involves the determination of the question whether the company or the patron must pay for the revenue stamp required by the federal statute to be affixed to the company's receipts.

2. CORPORATIONS—NEGLECT OF PUBLIC DUTIES—MANDAMUS.
   Mandamus will lie by the attorney general, on the relation of an individual, to compel an express company to perform the duties imposed upon it by law with reference to the receiving and forwarding of goods.

3. SAME—JOINT-STOCK ASSOCIATIONS.
   Circuit Court Rule No. 46, giving circuit courts jurisdiction in *mandamus* proceedings involving the action of any "private corporation," uses the term "corporation" as embracing joint-stock associations, and other associations of a corporate nature.

4. EXPRESS COMPANIES—REVENUE STAMPS—LIABILITY.
   Under the war-revenue act of June 13, 1898, making it the duty of express companies to issue to every shipper or consignor a bill of lading or other evidence of receipt, to which there shall be attached a revenue stamp of the value of one cent, and prescribing a heavy penalty for failure to issue such bill, the express company, and not the shipper, has the duty of paying for the stamp.

5. SAME—EVASION OF DUTY—INCREASE OF RATES.
   The duty resting upon the company under said act cannot be evaded by it, and the burden shifted to the shipper, by adding in each transaction, to its former fixed charges, the cost of the stamp, under the pretext of establishing new rates by virtue of its authority to prescribe reasonable regulations for its business.

6. SAME—MANDAMUS BY ATTORNEY GENERAL—PARTIES INTERESTED.
   A writ of *mandamus* issued in a proceeding instituted by the attorney general, on the relation of a shipper, to compel an ex-

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press company to receive goods for transportation without requiring the consignor to pay the stamp duty imposed by the war-revenue act of June 13, 1898, should not be limited to the parties to the record, but may run against the express company for the protection of the shippers within the State, where it definitely appears from the petition and answer that the requirement complained of is the uniform practice of the company.

Certiorari to Wayne; Frazer, J. Submitted November 15, 1898. Decided December 6, 1898.

Mandamus by Fred A. Maynard, Attorney General, on the relation of George F. Moore and others, to compel the American Express Company to receive and forward goods without requiring the payment of the stamp tax by the consignor. From an order granting the writ, respondent brings *certiorari*. Affirmed.

Warner, Codd & Warner, for relators.

Wisner & Harvey (*H. C. Wisner*, of counsel), for respondent.

LONG, J. The attorney general, on the relation of various merchants in the city of Detroit, filed a petition in the Wayne circuit court for a *mandamus* to compel the respondent, its officers, agents, and servants, to receive, accept, transmit, and deliver any and all goods, wares, and merchandise duly offered and tendered to it, in boxes, packages, etc., for transportation, when the fees and charges for such goods shall be paid or tendered, and to issue to the shippers or consignors throughout this State a bill of lading or evidence of receipt for each shipment, with the stamp duly attached thereto and canceled by it, as provided by the act of Congress of June 13, 1898, entitled "An act to provide ways and means to meet war expenditures, and for other purposes," without requiring of consignors or shippers said stamp, or the value thereof. The court below issued an order to show cause, and, a

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return having been made to such order by the respondent, the court granted the writ as prayed. The case comes into this court by *certiorari*.

The respondent is a joint-stock association organized and existing under the laws of the State of New York, and having its principal business office in the city of New York. It is a common carrier, transacting express business, so called, and engaged in the business of receiving, carrying, forwarding, and delivering goods, wares, and merchandise. It is doing business in this State in pursuance of a license issued by the state treasurer under and by virtue of chapter 103, 1 How. Stat. The petition shows that the respondent, upon delivery of packages to it for transportation as a common carrier, refused to accept goods for transportation unless the shipper or consignor would pay for the stamp provided by said act of Congress; that this refusal was general throughout the State, by all its officers and agents; and that it has 489 agencies within this State. The respondent, in its answer filed in the court below, admits many of the allegations in the petition, but it alleges that in the act Congress has refrained from providing, as between shipper and carrier, which shall bear the burden of the tax, thereby intending to leave it a matter of adjustment between the parties, conditioned, however, that the tax must be paid; that the respondent, being organized and having the right, under the statutes of this State, to carry on an express business, becomes vested with the right to regulate the carrying on of its business by reasonable rules and regulations, and to fix, and insist upon the payment of, such rates of transportation as it deems best, provided the same are not unreasonable in amount nor in manner of payment; that, the enactment of the stamp act referred to being an important change in the then condition of things, it becomes necessary for respondent to change and regulate its method of transacting business, and to re-establish its rates of transportation, so that it may meet the change in a way to prevent its resources from being so depleted as to

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weaken its financial condition; that respondent therefore decided to raise, and has raised, its rates of transportation to an amount reasonable and just, and only necessary to meet the change of conditions made by the act, and save itself from great loss of revenue and profits as compared with its earnings before the passage of the act, which it has the lawful right to do; that under its right to regulate its manner of doing business, and with view to accommodating the public, so far as paying said increase of rates, respondent has accorded to responsible shippers the right to pay such increase (either using a stamp or money for the purpose) upon delivery of the goods, and the privilege of paying the balance of the rate of transportation at the point of delivery to the consignee. It is admitted that this change in the manner of doing business in effect throws the burden of the tax upon the shipper, but it is claimed that such effect is in accordance with the principle of taxation that the burden shall be distributed equitably among the many, rather than be cast upon the few; and it is claimed that should the respondent be compelled to pay the tax, which would amount to many thousands of dollars, without the right to guard against the effect of such expenditure in the manner adopted by it in raising its rates of transportation, as has been done, its financial condition would be greatly weakened.

In the answer it is also alleged that, in any case of pretended violation of its duties as set forth in the petition, it was not pretended or alleged that the charges were paid or tendered; but it appears from the opinion of the court below that this point was abandoned on the argument there, and the case was left to the court below to decide the same as if the charges had been tendered. That question will not, therefore, be discussed here, but it will be taken as settled that the charges were so tendered.

The act of Congress (30 U. S. Stat. at Large, chap. 448) provided:

"SEC. 6. That on and after the first day of July, 1898,

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there shall be levied, collected, and paid, for and in respect of the several bonds, debentures, or certificates of stock and of indebtedness, and other documents, instruments, matters, and things mentioned and described in Schedule A of this act, or for or in respect of the vellum, parchment, or paper upon which such instruments, matters, or things, or any of them, shall be written or printed, by any person or persons or party who shall make, sign, or issue the same, or for whose use or benefit the same shall be made, signed, or issued, the several taxes or sums of money set down in figures against the same, respectively, or otherwise specified or set forth in the said schedule. * * *

"SEC. 7. That if any person or persons shall make, sign, or issue, or cause to be made, signed, or issued, any instrument, document, or paper of any kind or description whatsoever, without the same being duly stamped for denoting the tax hereby imposed thereon, or without having thereupon an adhesive stamp to denote said tax, such person or persons shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall pay a fine of not more than one hundred dollars, at the discretion of the court, and such instrument, document, or paper, as aforesaid, shall not be competent evidence in any court."

Schedule A of said act, among other things, provides as follows:

"*Express and Freight:* It shall be the duty of every railroad or steamboat company, carrier, express company, or corporation or person whose occupation is to act as such, to issue to the shipper or consignor, or his agent, or person from whom any goods are accepted for transportation, a bill of lading, manifest, or other evidence of receipt and forwarding, for each shipment received for carriage and transportation, whether in bulk or in boxes, bales, packages, bundles, or not so inclosed or included; and there shall be duly attached and canceled, as is in this act provided, to each of said bills of lading, manifests, or other memorandum, and to each duplicate thereof, a stamp of the value of one cent: *Provided*, that but one bill of lading shall be required on bundles or packages of newspapers when inclosed in one general bundle at the time of shipment. Any failure to issue such bill of lading, manifest, or other memorandum, as herein provided, shall subject such railroad or steamboat company, carrier, express company, or corporation or person to a penalty of fifty

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dollars for each offense; and no such bill of lading, manifest, or other memorandum shall be used in evidence unless it shall be duly stamped as aforesaid."

The relators contend that the duty to pay this tax is cast upon the respondent by the terms of the act, and that, when the proper charges were tendered for the transportation, it became the duty of the respondent to undertake the carriage, and that respondent has no right, under the guise or pretense of raising its rates, to cast this burden upon the public.

1. It is contended by counsel for respondent that the question is one over which the federal courts have exclusive jurisdiction. We cannot agree with counsel in this contention. This is not an action for the recovery of the penalty which the statute imposes for failure to issue the bill of lading, but a proceeding for an order to compel the respondent, a common carrier, to accept and carry the goods tendered it for shipment when the regular charges are paid or tendered. The respondent is a common carrier, and as such it is its duty to receive for carriage and to carry the goods of any person tendered to it for transmission, provided they are such as it holds itself out as willing to carry, and the party tendering them offers to pay its proper charges. This duty is imposed by law. 5 Am. & Eng. Enc. Law (2d Ed.), 158, 159. The respondent is permitted to do business in this State, though not incorporated under the laws of the State, but it is subject to all the duties and obligations which the law imposes upon common carriers; and for a refusal to carry goods when tendered, and charges paid, the State courts may be appealed to for redress. This matter is entirely between the shippers and the company. This view is held by the attorney general of the United States in a recent opinion, in which he says:

"In controversies arising between shippers and express companies as to which one shall be required to bear the expense of the stamp, the general government has no direct concern under the war-revenue law."

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The general government, it appears, refuses to proceed against express companies for a violation of the act, unless it be made to appear that the company has accepted goods for shipment, and has refused to attach the stamp to the receipt given therefor; that is, the general government may and will prosecute for the penalty fixed by the act when goods are received and shipped without the company's affixing the revenue stamp to the receipt or bill of lading, but it will not interfere between the public and the company for refusal to carry. The commissioner of internal revenue on August 1, 1898, decided that the aggrieved parties,—that is, the parties offering goods for shipment,—when the company refuses to carry without payment of the stamp, must depend for redress upon the common or the statute law of the State defining the obligations of common carriers.

2. Unless, therefore, the shipper should pay the tax, the company is bound to carry, upon the payment or tender of the regular charges. The company is vested with the exercise of public functions under the permissive power of the State; and, when it refuses to discharge the duties imposed by law, *mandamus* is the proper remedy to compel the discharge of that duty. The American courts have taken such occupations under their control, and, regarding them as public agencies, have enforced the common law or the statutory law against them, and have not hesitated to grant the writ of *mandamus* against any party who, having assumed public duties, refuses to discharge them. *Haugen* v. *Water Co.*, 21 Or. 411; *Olmsted* v. *Aqueduct Proprietors*, 47 N. J. Law, 311.

But counsel contend, further, that the power given to the circuit courts to issue *mandamus* rests upon Cir. Ct. Rule No. 46, which provides, "Circuit courts shall have jurisdiction within their respective counties in all *mandamus* proceedings involving the action of any officer or board of any county, township, city, or school district, or of the common council of any city or village, and the action of any private corporation or officer or board thereof," and that,

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this rule not having included joint-stock associations, the circuit courts are not vested with power to issue the writ. "Corporations" and "associations" are convertible, and often used as synonymous, terms. There is no reason for any distinction or discrimination between corporations and joint-stock associations, in applying this rule. It is the intent of the rule to place all *mandamus* proceedings of this character primarily in the circuit courts. In reference to the assessment and collection of specific taxes, the legislature of this State has recognized the terms as convertible. Section 1255, 1 How. Stat., provides:

"The term 'corporation,' as used in this act, shall be construed to include all associations and joint-stock companies having any of the powers or privileges of corporations not possessed by individuals or partnerships."

In *Maltz* v. *American Express Co.*, 1 Flip. 611, it was held that, whether a corporation or not, a joint-stock association is a distinct legal entity, and that so long as this fact exists, and it possesses the attributes of perpetual succession, and the capacity of suing and being sued, it is a juridical person, and must be regarded as a citizen of the State which creates it; and it is wholly immaterial whether it be termed an "association," "joint-stock association," or "guild."

3. The main question in the case relates to the construction to be placed upon the act in question. By the act every express company is compelled to issue to every shipper or consignor, etc., a bill of lading for each shipment received for carriage, to which bill of lading and duplicate thereof there shall be attached and canceled a stamp of the value of one cent. The law therefore imposes upon the carrier the obligation to issue the receipt. With this the shipper has nothing to do. He delivers the package to the company, and pays or tenders the usual charges. This ends the shipper's duty, and the law then compels the carrier to issue the receipt or bill of lading. This bill must be stamped, and the stamp canceled. It is

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evident that it is as much the duty of the company to place the stamp upon the receipt and cancel it as it is to issue the receipt. This duty is made more apparent by the fact that the act further provides that failure to issue the receipt makes the carrier so failing amenable to a heavy penalty. But it is contended by counsel, in a brief filed with this court, that the penalty was directed, and intended by Congress to be directed, to the failure to issue the receipt, and nothing more, leaving the question of the stamping of the same to be settled by the parties. It seems to us that what is meant by this clause is that the receipt must be such as is provided,—that is, a receipt bearing the proper stamp,—and that the penalty is provided for such a failure as this. It is, and always has been, the custom of express companies to issue receipts for goods delivered for shipment. The only interest the government has or can have is the affixing and cancellation of the stamp to aid it in its war revenues. We are therefore led to the conclusion that the duty to issue the receipt, and the penalty prescribed for the failure to do so, imply that it is to be a receipt which would bring the government the revenue provided. Therefore the act makes it the duty of the company to affix the stamp.

4. It is contended, however, that the company has the right to make new regulations and establish new rates to meet this burden. It is conceded that the effect of this is to throw the burden upon the shipper. It is apparent upon the face of this proceeding that the very purpose of this change in the regulations and the increase of rates is to avoid the payment of the tax, and thus cast upon the shippers the burden which the act of Congress puts upon the company. This is but an evasion and a subterfuge to avoid the terms of the act. The pretense that raising the charges on each package just one cent, without reference to the distance to be carried, the weight or bulk of the package, and the former fixed charges, is a regulation of charges, can hardly be treated seriously. If the charges established were regarded as too small, it would seem that

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the action would have been to make the additions in some manner to correspond to the length of carriage, weight, etc.; but to add one cent to every charge for carriage bears upon its face evidence of the attempt to evade the act. Where the charge established was 25 cents it is now 26 cents; where it was 50 cents it is now 51 cents; where $1 it is now $1.01; and so on, adding just one cent to each charge. It cannot be that this was done because the charge was too low for each carriage, however long the distance, or however weighty the article. The statement of this claim is its own refutation. We are aware that Judge Lacombe, of the United States circuit court of New York, has held the other way upon this question, in the case of *Crawford* v. *Hubbell*, 89 Fed. 961, as also the United States district courts of North Carolina and California; but we are unable to agree with those cases. Judge Tuley, in the superior court of Cook county, Ill., has, however, held in accordance with our views here expressed. It is said by him that "it is not in fact a revision or increase of rates, but an arbitrary attempt of the company to make the shippers pay a tax which the law requires the company to pay. The court must regard the substance of the contention, and not the pretense." *People, ex rel. Western Wheel Works*, v. *United States Express Co.*, 30 Chicago Legal News, 408.

5. It is further contended that the order of the court below is too broad; that the writ should run against the company only so far as to affect the parties to this record. The petition is filed by the attorney general of the State, in which it is stated that these cases constitute but few of the many of like character, and are presented for the purpose of representing the uniform course of practice of the respondent company. This is not denied by the answer, but, on the contrary, the claim is made therein that the regulation of its business affairs, and the change in its rates of transportation, throw the burden of the tax upon the shipper, by force of circumstances. It is thus apparent that the attorney general's petition, taken with the answer

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of the respondent, is sufficient to show that the respondent is attempting to enforce this rule throughout the State in its dealings with all its customers; and the case involves the question whether the order should be broad enough to reach the rights of all classes who are shippers within the State. We think the order should not be modified as claimed.

The order of the court below must be affirmed.

The other Justices concurred.

PEOPLE *v.* WILLIAMS.

1. CRIMINAL LAW—ASSAULT WITH INTENT TO DO GREAT BODILY HARM—SUFFICIENCY OF EVIDENCE.

   A conviction under respondent's own testimony might properly be had, in a prosecution for assault with intent to do great bodily harm less than murder, where such testimony is to the effect that he, with no reasonable provocation, knocked the complainant down and kicked him in the head several times, and repelled with a knife the efforts of bystanders to interfere.

2. SAME—CONTINUANCE—JUROR AS WITNESS.

   A continuance on the ground that one of the jurors for that term of court was one of the *res gestæ* witnesses for the prosecution, and that his name was indorsed on the information, was properly refused, where those jurors called upon the panel who were acquainted with him stated that such acquaintance would not bias their minds.

3. SAME—NEW WITNESSES—INDORSEMENT ON INFORMATION—CONSENT OF COUNSEL.

   One week before a criminal cause was brought on for trial, the prosecuting attorney called one of respondent's counsel to the rooms of the judge of the court, and stated that he proposed to indorse upon the information the names of certain additional witnesses. Counsel made no objection at the time, but, after consulting with the other counsel, moved the court to strike off the names. *Held*, that in view of 2 How. Stat. § 9549, provid

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ing that the prosecutor may, at such time before the trial as the court may prescribe, indorse the names of additional witnesses, the court was justified in denying the motion, notwithstanding no showing had been made as to when the prosecutor became cognizant of the fact that such witnesses were material to the prosecution.

4. SAME—RULING NOT PREJUDICIAL.

One accused of an assault is not prejudiced by the court's refusal at the trial to have indorsed on the information the name of an alleged witness, whose presence is denied by the other witnesses, and whose deposition thereafter introduced in his behalf alleges that she ran away after seeing him strike complainant.

5. SAME—JURORS—PREJUDICE.

A juror is not disqualified to sit on a trial for assault, because he sat in a case in which the proprietor of the house in which respondent boarded was charged with keeping a house of ill fame, where he states that he has no opinion or prejudice on the question of the guilt or innocence of the respondent, nor any prejudice that would in any way affect his credit upon the stand as a witness.

6. SAME—EVIDENCE—SELF-DEFENSE—INSTRUCTIONS.

Refusal to charge the jury on a trial for assault, that, if the respondent acted in self-defense, they must acquit, is not error, where there was no testimony in the case to warrant such a charge, and the jury might properly have convicted the accused upon his own testimony.

Error to superior court of Grand Rapids; Burlingame, J. Submitted November 18, 1898. Decided December 6, 1898.

George Williams was convicted of assault with intent to do great bodily harm less than the crime of murder. Conviction affirmed.

Nathan P. Allen (*Brown & Adams*, of counsel), for appellant.

Fred A. Maynard, Attorney General, *Frank A. Rodgers*, Prosecuting Attorney, and *Benn M. Corwin*, Assistant Prosecuting Attorney, for the people.

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LONG, J. Respondent was convicted in the superior court of Grand Rapids of an assault upon one Frank Daley, with intent to do him great bodily harm less than the crime of murder. The information was filed under section 9122*a*, 2 How. Stat. It appears that the respondent was convicted of a misdemeanor under a former complaint made by Daley, the complaining witness in the present case. That case came to this court, and was affirmed. *City of Grand Rapids* v. *Williams*, 112 Mich. 247. The case being remanded with directions to proceed to judgment, Williams was sentenced to 90 days' imprisonment in the county jail, his term expiring about July 1, 1897.

The testimony in the present case introduced by the prosecution shows that, on the 4th of August following his release, respondent was fishing in Grand River from a footbridge, when Daley, in company with a Mr. Bennett, crossed the bridge. Daley passed the respondent some feet, and stopped to talk with a Mr. Ten Hopen. After some conversation, Daley asked Ten Hopen, "What are they fishing with,—worms?" At this respondent said, "Who are you talking to,—me?" Daley responded, "No; to this gentleman." Respondent then said, "I thought you would have a lot of gall to speak to me;" adding some profane words. Daley responded, "I am not talking to you," and started to go away, when respondent ran up behind him, knocked him down, and kicked him eight or ten times on the head. Mr. Bennett started to separate them, when respondent took out a knife, and struck at him, and said, "I will stick this into you." Bennett retreated, when respondent again knocked Daley down, and again kicked him. Daley finally got up, and started to run across the bridge, but was followed up by respondent, who overtook him, knocked him down again, kicked him, at the same time striking at him with a knife, and cutting a gash in his finger three-fourths of an inch in length, and saying to him, "You made me serve 90 days in jail, and I will cut your —— white heart out." Mr. Bennett

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then called others who were passing by to come and help him, when the respondent turned, and ran back across the bridge. On his return across the bridge, he stated to a Mr. Moon that he would kill Daley if he had to follow him to his house to do it. Daley was badly injured, and confined to his house for some two weeks or more.

The respondent was called as a witness in his own behalf. His testimony does not vary materially from the other witnesses as to what occurred, though he denies having used the knife on Daley. He does admit, however, that he drew it on Bennett, and that he knocked Daley down, and kicked him, as described by the witnesses for the prosecution. Under his own testimony, the jury might properly have found the respondent guilty of the offense charged.

Six errors are assigned by counsel for respondent:

1. A continuance was asked by respondent, for the reason that Mr. Bennett, one of the jurors for that term of court, was one of the *res gestæ* witnesses for the prosecution, his name being indorsed on the information. This was denied. It appears that Mr. Bennett was on the bridge, and present at the time of the assault by respondent. The jurors, when called upon the panel, were fully examined, and were each shown to be qualified to sit. They were asked about their acquaintance with Mr. Bennett. Some of them had no acquaintance whatever with him, and those who knew him stated that such acquaintance would in no wise bias their minds. The mere fact that Bennett was returned as a juror for the term did not prejudice the rights of the respondent, though Bennett was one of the witnesses to be called in the case. If continuances are to be granted because some of the jurors are acquainted with the witnesses for the prosecution, it would be difficult to bring criminal cases on for trial at any term. There is no such rule as contended for. The matter of continuance rested in the discretion of the court, and there was no abuse of it here.

2. The trial of the cause was commenced on January

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17, 1898. It appears that on January 10th the prosecuting attorney indorsed the names of two witnesses on the information. Before doing so, he called one of the counsel for the respondent to the rooms of the judge of the court, and stated to him that he proposed to so indorse the names. Counsel made no objection at the time, but thereafter, on consultation with the other counsel, objection was made, and the court was asked to strike these witnesses' names from the information. This was refused. Section 9549, 2 How. Stat., provides that the prosecuting attorney shall indorse on all informations the names of the witnesses known to him at the time of filing the same; and, at such time before the trial of any case as the court may by rule or otherwise prescribe, he shall also indorse thereon the names of such other witnesses as shall then be known to him. We think the statute was complied with. The names were indorsed seven days before the trial commenced. It is true that no affidavit was filed showing the time when the prosecuting attorney became cognizant of the fact that such witnesses were material for the prosecution; but, when their names were indorsed, counsel for respondent made no objection. The names could have been indorsed after the trial commenced, without the showing, if consented to by counsel for respondent. The court very properly refused to strike them off. *People* v. *Howes*, 81 Mich. 396.

3. During the trial, the respondent asked to have the name of one Dora Gardner indorsed on the information. This the court refused, and exception was taken. On motion for new trial, the same point was pressed, and the court said, in refusing the new trial:

"The prosecuting attorney stated that he had no knowledge of any such person as Dora Gardner being present, and that he had several witnesses who swore that no such woman, nor any woman, was present at the time of the assault, and the court doubts of her being there at all. This Dora Gardner was used originally to try to get this case over the term, and finally, failing in this, she was

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used as a witness for respondent by deposition, which could not have been if she had been the people's witness, so that the fact that her name was not on the information redounded to the respondent's advantage."

In addition to this, it appears from the testimony of Dora Gardner that all she saw was that respondent struck Daley, when she ran away from the scene. Under the circumstances, the respondent was not prejudiced by the prosecution's failure to indorse the name of this witness on the information.

4. It is claimed that the court was in error in not sustaining the challenge for cause made against the jurors John Muir and Cornelius Kelley. It appears that the case of People against Eliza Conway was tried in that court a few days before the case against respondent was called. Eliza Conway was charged in that case with keeping a house of ill fame. It was shown that respondent and Dora Gardner boarded at the Conway house. The above-named jurors were on the panel for the trial of the Conway case, and testimony was given on that trial as to the character of the house kept. These jurors were asked in the present trial whether they had any opinion, bias, or prejudice at all on the question of the guilt or innocence of the respondent on the charge he was being tried upon, or any prejudice against him that would in any way affect his credit upon the stand as a witness. They answered, "Not in the least." The court, in its sound discretion, overruled the motion to reject these jurors for cause. It was said in the case of *People* v. *Thacker*, 108 Mich. 654:

"It has been repeatedly held in this State, and may be regarded as the well-settled law, that one is not disqualified from serving as a juror simply because he has heard and read about the case, and has formed an impression based upon what he has heard and read, if the impression is not of that fixed character which repels the presumption of innocence."

And in *People* v. *Barker*, 60 Mich. 287 (1 Am. St. Rep. 501), it was said:

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"The opinion entertained by a juror which disqualifies him is an opinion of that fixed character which repels the presumption of innocence in a criminal case, and in whose mind the accused stands condemned already."

In the present case the jurors had no fixed opinion whatever, and, in fact, stated they had no bias or prejudice against respondent. The mere fact that they sat in another case, in which another party was charged with immorality, and that the respondent was an inmate in that house, did not disqualify them to sit in the present case. It was not error to overrule the motion to discharge for cause.

5. Counsel for respondent substantially asked the court to charge the jury that, if they found that respondent was acting in self-defense, they must acquit. There was no testimony in the case which would warrant such a charge; and, as we have before stated, the jury might properly have convicted the respondent upon his own testimony.

This, in effect, covers the remaining assignment of error.

We find no error in the case, and the conviction must be affirmed.

The other Justices concurred.

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PEOPLE v. PHILLIPS.

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FORGERY—ORDER FOR PROPERTY—WHAT CONSTITUTES.

An instrument reading, "Mr. G., would you let me have [certain property], and I will settle with you," signed "Mrs. S.," is an "order" for property, within the meaning of 2 How. Stat. § 9213, relating to the crime of forgery.[1]

Error to Ingham; Person, J. Submitted November 18, 1898. Decided December 6, 1898.

Clarence Phillips was convicted of forgery, and sentenced to imprisonment for three years in the state prison at Jackson. Affirmed.

Bartlett Wiley, for appellant.

A. M. Cummins, Prosecuting Attorney, for the people.

MOORE, J. The respondent was convicted of forgery, under section 9213, 2 How. Stat. The information charged, and Mr. Phillips pleaded guilty to, the forgery of an instrument reading as follows:

"Mr. Gleason, would you let me have one bottle of St. Jacob's oil, and I will settle with you when I come to town. I have a small bill with you now.

"MRS. SMITH, Gunnisonville."

It is claimed that to forge such a paper is not a crime, under the statute. It is said this is not an order for property, but a mere request, and that, to constitute such an order as is intended by the statute, the drawer of the order must have a disposing power over the goods, and the person upon whom it is drawn must be under obliga-

[1] On the question what instruments are of such legal efficacy as to be subjects of forgery there is an extensive note to the case of *People* v. *Munroe*, (Cal.) 24 L. R. A. 33.

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tion to accept the order; citing Bish. Stat. Crimes (2d Ed.), §§ 328, 329; *State* v. *Lamb*, 65 N. C. 422; *State* v. *Leak*, 80 N. C. 403.

The English rule was originally as stated by the counsel for respondent, and the North Carolina cases follow the English rule; but the weight of authority is quite the other way. The words "any order * * * for money or other property" should be given their usual and accepted meaning. If the construction urged by counsel is to control, the evils which the statute sought to prevent may be suffered, and the offender go free. The criminally inclined would soon be so cunning as to frame the order in the form of a request, and direct it to one who was under no obligation to accept it, but who, nevertheless, would do so. The drawee of the order would be led to part with his money or property, the mischief would be accomplished, and the person wrongfully accomplishing it escape. We do not think this is consistent with the language of the statute, or the reason of its enactment. *State* v. *Holley*, 1 Brev. 35; *People* v. *Shaw*, 5 Johns. 236; *State* v. *Cooper*, 5 Day, 250; *Hoskins* v. *State*, 11 Ga. 92; *Com.* v. *Fisher*, 17 Mass. 46.

Judgment is affirmed.

The other Justices concurred.

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ABATEMENT—See JUSTICES OF THE PEACE.

ACCORD AND SATISFACTION—See SETTLEMENT.

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ACCOUNTING.

1. A court of law may take jurisdiction of an action to recover unliquidated damages for a fraudulent breach of contract, although the declaration shows that an extensive, though not complicated, account must be taken in the case. *Church* v. *Anti-Kalsomine Co.*, 219.

2. An objection that the remedy at law is impracticable in such a case, because of the inability of a jury to retain the items of the account, is without force, in view of 2 How. Stat. § 7378, authorizing a compulsory reference of matters of account in actions at law where no jury is demanded, and 2 How. Stat. §§ 7386, 7391, authorizing the appointment of auditors, when a case is at issue, to investigate such accounts, and making the report of the auditors competent evidence. *Id.*

See EQUITY JURISDICTION (3, 7); TRUSTS AND TRUSTEES (1).

ACTIONS.

1. The fact that a cause of action arises because of contract relations between the parties does not necessarily preclude the action's being framed in tort, where a considerable part of the case rests upon matters outside of, though connected with and dependent upon, the contract. *Church* v. *Anti-Kalsomine Co.*, 219.

2. *Assumpsit* will lie to recover damages for the breach of an express warranty as to the quality of an article sold, although such damages are consequential in their nature. *Tatro* v. *Brower*, 615.

See ACCOUNTING; ATTORNEY AND CLIENT (2); BAILMENT; EQUITY JURISDICTION (6); JUSTICES OF THE PEACE; MECHANICS' LIENS (2); PRINCIPAL AND SURETY (2, 3); PUBLIC OFFICERS; STATUTE OF LIMITATIONS; TELEGRAPH COMPANIES (1); TROVER.

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AMENDMENTS.

Refusal of the trial judge to permit an insurance company, in an action against it on its policy, to amend its plea of the general issue, on the statement of counsel that a special defense was first made known by the cross-examination of the plaintiff, is not an abuse of discretion, where, from the questions propounded on the cross-examination, it is apparent that some thought of such defense must have been entertained, and preparation made therefor, before the trial, and the refusal to pay the loss, which was small, was based upon an entirely distinct claim. *Baker* v. *Michigan Mutual Protective Ass'n*, 431.

See CONSTITUTIONAL LAW (4); DEPOT COMPANIES (1); EQUITY PRACTICE (1); GARNISHMENT (2); RAILROAD COMPANIES (9); TAXES (22).

APPEAL AND ERROR.

1. Statements by the prosecuting attorney in his argument, although improper as shown by the reporter's minutes, will not be so considered, where affidavits as to the exact language used, made by the attorney and several of the jurors, indicate an entirely proper statement,—especially where no objection was made to the language used until the reporter's minutes were written out. *People* v. *Swartz*, 293.

2. An objection that the evidence shows the verdict to have been a compromise verdict cannot be considered on appeal where the record does not purport to contain all the evidence. *Stevenson* v. *Detroit, etc., R. Co.*, 651.

3. Where a chancery case turned entirely upon the credibility of the witnesses for the respective parties, whose proofs were in direct conflict, the finding of the circuit judge, who saw and heard the witnesses, was not disturbed. *Birdsall* v. *Birdsall*, 658.

4. Where, in an action between landlord and tenant, the claim is made that a payment of certain moneys under the lease was through mistake, and the case is presented to the jury upon that theory, the further claim that the payment was under duress, asserted for the first time on appeal, cannot be considered. *Lamb* v. *Rathburn*, 666.

See HIGHWAYS (1, 2); INJUNCTIONS (1-3); INSANE PERSONS (2); JUSTICES OF THE PEACE; MANDAMUS; NEW TRIAL; PRACTICE IN CIRCUIT COURT (2); RECEIVERS (1); TAXES (21, 22, 26).

APPLICATION OF PAYMENTS—See PAYMENTS; USURY.

ARBITRATION AND AWARD—See CONTRACTS (3); FIRE INSURANCE (2); MUNICIPAL CORPORATIONS (11).

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ASSAULT.

A conviction under respondent's own testimony might properly be had, in a prosecution for assault with intent to do great bodily harm less than murder, where such testimony is to the effect that he, with no reasonable provocation, knocked the complainant down and kicked him in the head several times, and repelled with a knife the efforts of bystanders to interfere. *People* v. *Williams*, 692.

ASSIGNMENTS FOR BENEFIT OF CREDITORS — See CHATTEL MORTGAGES (2).

ASSUMPSIT — See ACTIONS (2); BAILMENT; PLEADING (1, 2); TELEGRAPH COMPANIES (1).

ASYLUMS—See INSANE PERSONS.

ATTACHMENT.

An affidavit for attachment, which sets up the surreptitious transfer from defendant's place of business to a private residence of a portion of a stock of goods purchased from plaintiff on credit, the disposition of others to personal friends financially irresponsible, the mortgaging of the stock to its full value, and the false representation to other creditors that plaintiff's claim had been paid,—is sufficient to authorize the issuance of the writ, under 3 How. Stat. § 8016*a*, before the maturity of the debt. *E. H. Chase & Co.* v. *Wayne Circuit Judge*, 358.

ATTORNEY AND CLIENT.

1. An attorney's undertaking to "secure" for his client her rights in a decedent's estate, in consideration of a stipulated interest in the property so secured, is fulfilled, so as to entitle him to the agreed compensation, where he performs all services necessary to the establishment of his client's rights, although the estate acquired vests in the client by operation of law. *Moran* v. *L'Etourneau*, 159.

2. Plaintiff, an attorney, agreed to perform certain services for defendant in and about a suit at law, for which he was to receive no pay until a judgment was obtained and the case settled. After judgment in the client's favor, the money was placed by the adverse party in the hands of attorneys, to be paid over to the judgment creditor. A dispute having arisen meantime over the amount of plaintiff's claim, he brought suit. *Held*, that it was not premature. *Walbridge* v. *Barrett*, 433.

3. The fact that services rendered by an attorney under an agreement to charge what they are actually worth are performed with the further understanding that, unless he recovers judgment in his client's favor, he is to receive no compensation at all, has no bearing in determining the amount to which he is entitled if successful. *Id.* 434.

4. Evidence tending to show that an attorney, before bringing

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ATTORNEY AND CLIENT—Continued.

suit against a client for professional services, attempted to bring about an adjustment of their differences, is inadmissible in such suit; and the introduction of proof, as tending to show such attempted adjustment, of the declarations, brought home to the client by the plaintiff, of the judge in whose court the services were rendered, that the attorney ought to have half of the judgment recovered before him as compensation for his services, is prejudicial error. *Id.*

5. Refusing an instruction, in an action by an attorney against his client to recover for services rendered, that the opinions of lawyers who testified as to the value of the services are not conclusive, is erroneous, where there was other evidence bearing upon the question of such value. *Id.*

6. The Supreme Court will not take judicial notice that the complainant in a bill to enforce a judgment is the same person as one bearing the same name who is an attorney of the court, upon a demurrer which sets up the statute (2 How. Stat. § 7185) prohibiting attorneys from purchasing claims for the purpose of instituting suit thereon. *Belden* v. *Blackman*, 448.

7. Nor, conceding the identity of the parties, will the court assume, from the fact that the bill demurred to was filed three days after the purchase of the judgment by complainant, that the purchase was for the purpose prohibited by the statute. *Id.*

ATTORNMENT—See LANDLORD AND TENANT (2).

AUDITORS—See ACCOUNTING (2).

BAILMENT.

One who leaves property with a bailee, who converts it to his own use, may waive the tort, and sue in *assumpsit* to recover its value. *Newman* v. *Olney*, 545.

BALLOTS—See ELECTIONS (4, 5).

BANKRUPTCY—See MORTGAGES (4).

BANKS AND BANKING.

A bank holding certificates of deposit issued by another bank, in which it has not actually deposited the moneys thereby represented, but to which it has given credit for the amount on its own books, against which checks or drafts have been drawn, is not a depositor, within the provision of 3 How. Stat. § 3208e5, creating an individual liability of stockholders to depositors. *State Savings Bank of Detroit* v. *Foster*, 268; *American Trust & Savings Bank of Chicago* v. *Foster*, 280.

See GARNISHMENT (3).

BENEFIT ASSOCIATIONS—See MUTUAL BENEFIT ASSOCIATIONS.

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BIBLE READINGS.

1. Judicial notice may be taken of the practice, which has obtained for many years in the public schools, of reading from the Bible and offering prayer in the presence of the pupils. *Pfeiffer* v. *Board of Education of Detroit*, 560.

2. The use in the public schools, for 15 minutes at the close of each day's session, as a supplemental text-book on reading, of a book entitled "Readings from the Bible," which is largely made up of extracts from the Bible emphasizing the moral precepts of the Ten Commandments, where the teacher is forbidden to make any comment upon the matter therein contained, and is required to excuse from that part of the session any pupil upon application of his parent or guardian, is not a violation of the State Constitution, article 4, § 41, prohibiting the legislature from diminishing or enlarging "the civil or political rights, privileges, and capacities of any person on account of his opinion or belief concerning matters of religion." *Id.*

3. Nor is it a violation of article 4, § 40, providing that "no money shall be appropriated or drawn from the treasury for the benefit of any religious sect or society, theological or religious seminary, nor shall property belonging to the State be appropriated for any such purposes." *Id.*

4. Nor is it a violation of article 4, § 39, providing that "the legislature shall pass no law to prevent any person from worshiping Almighty God according to the dictates of his own conscience, or to compel any person to attend, erect, or support any place of religious worship, or to pay tithes, taxes, or other rates for the support of any minister of the gospel or teacher of religion." *Id.*

BILL OF EXCEPTIONS—See NEW TRIAL.

BILL OF REVIEW—See TAXES (31).

BOARDS OF REVIEW—See TAXES (1, 41).

BOARDS OF SUPERVISORS—See HIGHWAYS (4, 5).

BONA FIDE PURCHASER—See TRUSTS AND TRUSTEES (3); VENDOR AND PURCHASER (3).

BONDS—See EQUITY JURISDICTION (4); PRINCIPAL AND SURETY; TAXES (19).

BOOKS OF ACCOUNT—See EVIDENCE (1); TRIAL (1).

BOUNDARIES.

1. Where disputed boundary lines have been established by express agreement, or under such circumstances that an agreement will be implied, and the parties have for any considerable time recognized them, they will be upheld, though title

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BOUNDARIES—Continued.

by adverse possession could not be maintained. *Pittsburgh, etc., Iron Co.* v. *Lake Superior Iron Co.*, 109.

2. Evidence that one of two companies owning land bordering upon a lake requested the other to deed to it such of the land under the waters of the lake as would be included within its subdivision of the section if its lines were projected through the lake, and that the request was refused on the ground that the boundary between the properties should be determined with reference to the rules of riparian ownership, shows that the boundary was in dispute. *Id.*

3. The statute of frauds, which operates to forbid the acquiring of title to land by estoppel, has no application to voluntary adjustments of disputed boundaries, to which, therefore, the doctrine of estoppel may be applied. *Id.*

See CORPORATIONS (2).

BOYCOTT—See EMPLOYER AND EMPLOYÉ (3-6).

BRICK, MEASUREMENT OF—See CONTRACTS (2, 3).

BRIDGES.

1. Notice to the contractor of a township bridge that it is being built of defective material is not notice to the township. *Moore* v. *Township of Hazelton*, 425.

2. One may properly presume, in the absence of any knowledge or indication to the contrary, that a township has repaired a weak and shaky bridge after the lapse of a year from the time that it was known to be in that condition. *Id.*

3. The question whether a thresher, who sustained damages by reason of such a bridge, had such knowledge, or opportunity of knowing, of the continuance of the defect as would render him guilty of contributory negligence in driving his machine upon the bridge, was for the jury, under proper instructions. *Id.*

4. In an action against a township for damages caused by the giving way of a bridge under a threshing outfit, the plaintiff, who had knowledge the year before the accident that the bridge was weak and shaky, was properly asked on cross-examination whether he did not think it was an act of carelessness to attempt to cross the bridge without first examining it to see whether, in his judgment, it was strong enough to sustain the weight of the machinery. *Id.*

5. While townships must construct bridges sufficiently strong to meet the ordinary requirements of travel in the community, they are not obliged to provide structures that will sustain loads that could not reasonably be anticipated. *Id.*

6. Whether a ten-horse traction engine and tank full of water was such a load was a proper question for the jury. *Id.*

BROKERS—See PRINCIPAL AND AGENT (1).

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BUILDING CONTRACTS—See CONTRACTS (2, 3); MECHANICS' LIENS; STATUTE OF FRAUDS (1).

BURDEN OF PROOF—See SALE (4).

BY-LAWS—See MUTUAL BENEFIT ASSOCIATIONS.

CARRIERS.

1. *Mandamus* will lie by the attorney general, on the relation of an individual, to compel an express company to perform the duties imposed upon it by law with reference to the receiving and forwarding of goods. *Attorney General, ex rel. Moore*, v. *American Express Co.*, 682.

2. Under the war-revenue act of June 13, 1898, making it the duty of express companies to issue to every shipper or consignor a bill of lading or other evidence of receipt, to which there shall be attached a revenue stamp of the value of one cent, and prescribing a heavy penalty for failure to issue such bill, the express company, and not the shipper, has the duty of paying for the stamp. *Id.*

3. The duty resting upon the company under said act cannot be evaded by it, and the burden shifted to the shipper, by adding in each transaction, to its former fixed charges, the cost of the stamp, under the pretext of establishing new rates by virtue of its authority to prescribe reasonable regulations for its business. *Id.*

4. A writ of *mandamus* issued in a proceeding instituted by the attorney general, on the relation of a shipper, to compel an express company to receive goods for transportation without requiring the consignor to pay the stamp duty imposed by the war-revenue act of June 13, 1898, should not be limited to the parties to the record, but may run against the express company for the protection of the shippers within the State, where it definitely appears from the petition and answer that the requirement complained of is the uniform practice of the company. *Id.*

See COURTS; RAILROAD COMPANIES.

CERTIFICATES OF DEPOSIT—See BANKS AND BANKING.

CHANGE OF VENUE—See CRIMINAL LAW (3).

CHATTEL MORTGAGES.

1. A chattel mortgage does not transfer the legal title to the mortgagee, but affords a security merely. *Wineman* v. *Fisher Electrical Manfg. Co.*, 636.

2. A chattel mortgage executed by an insolvent to secure a creditor is not an assignment for the benefit of creditors, within 3 How. Stat. § 8749*o*, providing that a person having a preferred labor claim against an insolvent may proceed in chancery for the appointment of a receiver, if a common-law or other assignment for the benefit of creditors shall have been made by the insolvent. *Id.*

See DURESS; MORTGAGES (1, 2, 5); PLEDGE; REPLEVIN (1); RES JUDICATA (1).

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CIPHER MESSAGE—See TELEGRAPH COMPANIES (5).

CITIES AND VILLAGES—See MUNICIPAL CORPORATIONS.

CIVIL RIGHTS—See BIBLE READINGS (2).

COLLATERAL ATTACK—See ESTATES OF DECEDENTS (1); TAXES (16, 18).

COMMON CARRIERS—See CARRIERS.

COMMON COUNTS—See PLEADING (1, 2).

COMPROMISE VERDICT—See APPEAL AND ERROR (2).

CONSIDERATION.

1. A mortgage executed by one who is interested as legatee in having an estate settled, to secure the performance by the executrix of her agreement either to perfect in her grantee, within a given time, the title to lands which had belonged to the estate, subject to a life interest in the executrix, and had been sold under license of the probate court, and purchased indirectly by herself, or, failing in this, to take back such title as the grantee has, paying therefor an agreed amount, is supported by a sufficient consideration. *Litchfield* v. *Tunnicliff*, 383.

2. By the terms of a five-year lease, the tenant was to pay an annual rent of $450. At the end of the first year, the tenant informed the landlord that he would be obliged to give up his lease, but consented to remain upon the landlord's promising a reduction of $50 in the rent. The $50 was deducted each year until the last year. The lease required the tenant to secure the rent each year by a chattel mortgage. The landlord promised the same reduction for the last year if the wife of the tenant would sign the mortgage, which she did accordingly. *Held*, that the agreement to reduce the rent was not without consideration. *Lamb* v. *Rathburn*, 666.

See DEEDS (3); VENDOR AND PURCHASER (3).

CONSOLIDATION—See RAILROAD COMPANIES (6–8).

CONSTITUTIONAL LAW.

1. That the title of an act is not broad enough to cover certain provisions thereof does not invalidate the act as to other and independent provisions. *Manistee, etc., R. Co.* v. *Commissioner of Railroads*, 349.

2. A constitutional provision could not mean one thing at the time of its adoption, and another thing at a subsequent time; and hence it is to be construed with reference to the state of the law at the time of such adoption, and to the practices and usages then prevailing. *Pfeiffer* v. *Board of Education of Detroit*, 560.

3. No constitutional provision will be construed as merely direc-

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CONSTITUTIONAL LAW—Continued.

tory. So *held* in a case involving the validity of a statute in the passage of which article 4, § 48, of the State Constitution, requiring the style of laws to be, "The People of the State of Michigan enact," was disregarded. *People* v. *Dettenthaler*, 595.

4. Parol evidence that the clerk of the house of representatives noticed the absence of an enacting clause in a senate bill previous to its passage by the house, and brought the matter to the attention of the house, stating that he would enter such a clause, and that he did so before returning the bill to the senate with the advice that it had been so amended by the house, if admissible at all, is insufficient to show an authorized amendment. *Id.*

5. The fact that an enacting clause, which was not a part of an act as passed by the legislature, was supplied before the act was presented for the governor's signature, does not make the act when signed by him a valid law. *Id.*

6. Under the foregoing principles, Act No. 76, Pub. Acts 1897, entitled "An act to prevent deception in the manufacture and sale of imitation butter," is unconstitutional. *Id.*

7. The subject-matter of a statute intended to prevent adulteration of vinegar, or deception in its sale, is sufficiently expressed by a title reading, "An act in relation to the manufacture and sale of vinegar." *People* v. *Worden Grocer Co.*, 604.

See BIBLE READINGS (2–4); DEPOT COMPANIES (1); EMPLOYER AND EMPLOYÉ (6); RAILROAD COMPANIES (1, 2); TAXES (3–5).

CONTEMPT—See RECEIVERS (3).

CONTINUANCE—See CRIMINAL LAW (9).

CONTRACTS.

1. Plaintiff furnished lumber for an improvement made by F. to defendant's house. Plaintiff testified that he said to defendant, "If I furnish the lumber for you, I am not going to charge it up to F., I will charge it to you;" that such was the understanding; that defendant said he wanted F. to furnish the lumber himself, so he could get his pay out of F., who owed him; that plaintiff said, "I cannot furnish the lumber for F. to pay his old bills;" and that defendant replied, "I think there will be enough in the job to pay me, and you for your lumber too." Another witness gave testimony from which it could be inferred that the credit was given to defendant, and was so understood by him. *Held*, sufficient to justify the submission to the jury of the question of an original promise by defendant. *Temple* v. *Goldsmith*, 172.

2. Where a building contract provides that brick furnished and laid shall be paid for at a stated amount per thousand, "measured in the wall," and is silent as to the method of measurement, a general custom of making such measurements

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CONTRACTS—Continued.

without deductions for openings for doors and windows will prevail. *Walker* v. *Syms*, 188.

3. A provision in a building contract, that any question that may arise between the parties "as to the true intent and meaning of the plans and specifications" shall be referred to the architect for final determination, confers upon the architect no authority to decide as to the method of measurement of brick used in the walls. *Id.*

4. Plaintiff, in January, telegraphed his broker in Chicago to buy 3,000 bushels of May wheat. In an action against the telegraph company for failure promptly to transmit the telegram, he testified that he expected to pay for and actually receive the grain. *Held*, that it could not be said, as a matter of law, that the contract contemplated was void as a gambling contract, within 3 How. Stat. § 9354*f*, prohibiting the purchase and sale of grain, etc., on margins for future or optional delivery, without intention of receiving or paying for the property so bought and sold. *Carland* v. *Western Union Telegraph Co.*, 370.

See ACTIONS; ATTORNEY AND CLIENT (1-3); CONSIDERATION; EMPLOYER AND EMPLOYÉ (1, 7, 8); EQUITY JURISDICTION (1, 6, 7); EVIDENCE (3, 5); LOGS AND LOGGING; MECHANICS' LIENS; MISTAKE; PRINCIPAL AND SURETY (1, 2); RAILROAD COMPANIES (2, 8, 10); SALE; SCHOOLS AND SCHOOL DISTRICTS (2); STATUTE OF FRAUDS.

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CONVENTIONS—See ELECTIONS (1-4).

CONVERSION—See BAILMENT; PLEDGE.

CORPORATE STOCK—See EQUITY JURISDICTION (3); EXECUTION (1, 2); PLEDGE.

CORPORATIONS.

1. A demand for the possession of land, made upon the agents of a corporation who are in the actual occupancy thereof, is a sufficient foundation for an application for a writ of assistance as against the corporation. *Ball* v. *Ridge Copper Co.*, 7.

2. A voluntary adjustment of boundary lines between mining corporations owning property bordering upon a lake, whereby they surrender, respectively, all claim to land on the north and on the south side of a section line projected through the lake, each thereby acquiring territory claimed by the other, the actual ownership of which could be determined only in equity, is not an alienation, division, or sale of the corporate real estate, such as will enable one of the companies to avoid the adjustment under 1 How. Stat. § 4052, on the ground that it was not authorized by three-fifths of the

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CORPORATIONS—Continued.

stock. *Pittsburgh, etc., Iron Co.* v. *Lake Superior Iron Co.*, 110.

3. Circuit Court Rule No. 46, giving circuit courts jurisdiction in *mandamus* proceedings involving the action of any "private corporation," uses the term "corporation" as embracing joint-stock associations, and other associations of a corporate nature. *Attorney General, ex rel. Moore,* v. *American Express Co.*, 682.

See MUNICIPAL CORPORATIONS; RAILROAD COMPANIES.

COUNSEL, CONDUCT OF—See APPEAL AND ERROR (1); CRIMINAL LAW (5); TRIAL (11-13).

COUNTIES—See INSANE PERSONS (3).

COURTS.

State courts have jurisdiction of a proceeding to compel an express company to receive and forward goods tendered to it by a patron, which involves the determination of the question whether the company or the patron must pay for the revenue stamp required by the federal statute to be affixed to the company's receipts. *Attorney General, ex rel. Moore,* v. *American Express Co.*, 682.

See CORPORATIONS (3).

CREDITOR'S BILL—See JUDGMENTS (2); RECEIVERS.

CRIMINAL LAW.

1. On a trial under an indictment by a grand jury, the accused can avail himself of no objections going to the competency of a grand juror other than those to which, under the statute (2 How. Stat. §§ 9496, 9497), he is limited when held to answer to such jury, viz., that the juror is prosecutor or complainant. *People* v. *Smith*, 73.

2. Upon a prosecution for violation of the local option law, the testimony was in direct conflict. After being out all night, the jury announced that they were unable to agree, but were sent back by the court, with the direction that each should try to be persuaded, instead of trying to persuade his fellows. The jury, within an hour, returned a verdict of guilty, with the recommendation that the court fix the penalty as light as the law would allow. *Held*, that the direction was calculated to convey to the individual juror the impression that the verdict need not be the result of his own convictions, and was therefore erroneous. *People* v. *Engle*, 287.

3. The denial of a change of venue, asked because of alleged local prejudice, is no ground for a reversal of a conviction, where the jury was obtained without the respondent having exhausted his peremptory challenges, and there is no evidence that the jury were improperly influenced. *People* v. *Swartz*, 292.

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CRIMINAL LAW—Continued.

4. Respondent, having been convicted at the May term of court, applied for a new trial, which was denied at the October term. In July following he made a motion for a rehearing of the application, on the ground of newly-discovered evidence. *Held*, that the motion was, in effect, for a new trial, and under 2 How. Stat. § 9576, authorizing the granting of new trials in criminal cases "at the same term" at which the trial is had, "or at the next term thereafter," came too late. *Id.*

5. Improper statements by the prosecuting attorney are not ground for reversal where the court peremptorily checked the attorney, and instructed the jury to disregard the improper remarks. *Id.* 293.

6. An instruction defining a reasonable doubt as a fair doubt, growing out of the testimony, based on reason and common sense, and not an imaginary, captious, or possible one, and as "such a doubt as may leave your minds, after a careful examination of all the evidence in the case, in that condition that you cannot say that you have an abiding conviction to a moral certainty, from the evidence in the case, of the truth of the charge," is not misleading. *Id.*

7. One charged with the sale of vinegar not in compliance with the statutory standard is not entitled to have a sample of the vinegar left with him by the prosecution, nor can he complain, upon conviction, that he was deprived of his property without due process of law because he was unable to obtain a sample for analysis, where he was not prevented from doing so by any person interested in the prosecution of the suit. *People* v. *Worden Grocer Co.*, 604.

8. Guilty knowledge or intent is not an element of the offense of selling vinegar below the standard prescribed by Act No. 71, Pub. Acts 1897. *Id.*

9. A continuance on the ground that one of the jurors for that term of court was one of the *res gestæ* witnesses for the prosecution, and that his name was indorsed on the information, was properly refused, where those jurors called upon the panel who were acquainted with him stated that such acquaintance would not bias their minds. *People* v. *Williams*, 692.

10. One week before a criminal cause was brought on for trial, the prosecuting attorney called one of respondent's counsel to the rooms of the judge of the court, and stated that he proposed to indorse upon the information the names of certain additional witnesses. Counsel made no objection at the time, but, after consulting with the other counsel, moved the court to strike off the names. *Held*, that in view of 2 How. Stat. § 9549, providing that the prosecutor may, at such time before the trial as the court may prescribe, indorse the names of additional witnesses, the court was justified in denying the motion, notwithstanding no showing had been made as to when the prosecutor became cognizant of the fact that such witnesses were material to the prosecution. *Id.*

11. One accused of an assault is not prejudiced by the court's refusal at the trial to have indorsed on the information the

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CRIMINAL LAW—Continued.

name of an alleged witness, whose presence is denied by the other witnesses, and whose deposition thereafter introduced in his behalf alleges that she ran away after seeing him strike complainant. *Id.* 693.

12. A juror is not disqualified to sit on a trial for assault, because he sat in a case in which the proprietor of the house in which respondent boarded was charged with keeping a house of ill fame, where he states that he has no opinion or prejudice on the question of the guilt or innocence of the respondent, nor any prejudice that would in any way affect his credit upon the stand as a witness. *Id.*

13. Refusal to charge the jury on a trial for assault, that, if the respondent acted in self-defense, they must acquit, is not error, where there was no testimony in the case to warrant such a charge, and the jury might properly have convicted the accused upon his own testimony. *Id.*

See APPEAL AND ERROR (1); ASSAULT; EMBEZZLEMENT; EVIDENCE (2); FORGERY; INTOXICATING LIQUORS.

CROSS-BILL—See EQUITY PRACTICE (2).

CUSTOM—See CONTRACTS (2).

DAMAGES—See ACTIONS (2); ATTORNEY AND CLIENT (3); PLEDGE (4); PRINCIPAL AND SURETY (3); REPLEVIN; TRIAL (13).

DEBTOR AND CREDITOR.

1. A debtor may prefer one creditor to another, and may use any of his property for the purpose of paying or securing his debts, in such order as he may select; and nothing but a distinct lien upon property can prevail against such disposition. *Belding Savings Bank* v. *Moore*, 150.

2. The lien of a prior unrecorded mortgage given to secure a creditor, to be delivered upon a contingency which may never happen, is inferior to that of a deed of trust given to secure another creditor, without notice of the existence of the prior mortgage. *Id.*

See ATTACHMENT; ESTATES OF DECEDENTS; FRAUDULENT CONVEYANCES; RECEIVERS.

DECLARATION OF TRUST—See TRUSTS AND TRUSTEES (2).

DECREE—See TAXES.

DEEDS.

1. An unrecorded deed is good as against an execution levy, in the absence of fraud. *Otis* v. *Sprague*, 61.

2. The facts that a deed from husband to wife was executed during the former's illness, that it was withheld from record until shortly before the maturity of an obligation incurred by

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DEEDS—Continued.

the husband after the execution of the deed, and that he in the meantime effected insurance upon the premises in his own name, and retained their management, are not conclusive that it was a qualified conveyance, to take effect only in case the wife survived him, where a prior promise to convey to the wife absolutely in consideration of her caring for his mother, and the rendition of the service contemplated, are clearly shown. *Id.*

3. Complainant, an aged woman, incapable, from grief over the recent death of her husband, of understanding the nature of business transactions, gave to defendant a deed of her property, in consideration of her support during life and burial at death. The grantee was a married woman, and, while her husband participated in the negotiations, he did not obligate himself to fulfill the wife's agreement as recited in the deed. No separate instrument binding defendant was executed, and the deed did not correctly represent the bargain which defendant's own testimony showed was made. *Held*, that it should be set aside. *Thomas* v. *Crawford*, 253.

4. A trust deed will not be set aside on the ground that it was made under duress or undue influence, or without knowledge that it was irrevocable, where an affidavit of the grantor two years after its execution, made in answer to a petition by his wife for an allowance of alimony, recites that, shortly after his marriage, he and his wife freely and voluntarily executed and delivered a deed of a large portion of his property in trust, to go to his children after his death, and that his only interest in the property is the net income derived therefrom. *Zinser* v. *Anderson*, 654.

See LANDLORD AND TENANT (1); RECORDING LAWS; RIPARIAN RIGHTS; SPECIFIC PERFORMANCE; TAXES (4, 35); TRUSTS AND TRUSTEES (2); VENDOR AND PURCHASER (1, 3).

DEFICIENCY—See MORTGAGES (3, 4, 6).

DELIVERY—See DEBTOR AND CREDITOR (2); ESCROW; SALE (1–3).

DEMURRER—See EQUITY PRACTICE (1, 3).

DEPOSITORS, WHO ARE—See BANKS AND BANKING.

DEPOT COMPANIES.

1. The general railroad law (Act No. 198, Laws 1873) is entitled "An act * * * to regulate the running and management, and to fix the duties and liabilities, of all railroad and other corporations owning or operating any railroad in this State." Section 3 of article 3 provides for the taxation of corporations subject to the act. By Act No. 228, Pub. Acts 1897, entitled "An act to amend section 3 of article 3 of Act 198, Session Laws of 1873, as amended, * * * entitled," etc., a radical change was made in relation to the rate of taxation, and union railroad station and depot companies, there-

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DEPOT COMPANIES—Continued.

tofore taxed under their organic act (Act No. 244, Pub. Acts 1881), were sought to be brought within the terms of said section 3 as amended. *Held*, that the act of 1897 did not contravene the constitutional provision (article 4, § 20) that no law shall embrace more than one object, which shall be expressed in its title, since the title of an amendatory act, which refers by chapter or section to the act amended, giving its title, will support any legislation that would have been permissible in the original act under such title, and a union depot company is a "corporation owning or operating a railroad," within the title of the act of 1873. *Fort-Street Union Depot Co.* v. *Commissioner of Railroads*, 340.

2. Act No. 228, Pub. Acts 1897, amendatory of the general railroad law, provides that every railroad company and union railroad station and depot company shall pay a specific tax, to be computed in the following manner: "Upon all such gross income not exceeding $2,000 per mile of road actually operated within this State, 2½ per cent. of such gross income; * * * upon all such gross income in excess of $8,000 per mile of the road so operated, 5 per cent. thereof; that * * * union railroad station and depot companies whose earnings are in excess of $20,000 per mile shall pay on all such gross incomes in excess of $20,000 per mile of road so operated 10 per cent. thereof." *Held*, not to provide for a double taxation of depot companies as to their gross earnings in excess of $20,000 per mile, nor to exempt their earnings below that amount, but to require them to pay 5 per cent. upon gross earnings above $8,000 per mile and below $20,000, and 10 per cent. on earnings above $20,000 per mile. *Id.* 341.

3. In determining the miles of railway operated by a union railroad station and depot company, for the purpose of the taxation of its gross income per mile, under Act No. 228, Pub. Acts 1897, there should be a separate measurement for each railroad running into its depot, provided it has as many tracks as there are roads, no two of which are used exclusively by any one road. *Id.*

DESCRIPTION OF LANDS—See TAXES (23, 28, 34).

DISCHARGE IN BANKRUPTCY—See MORTGAGES (4).

DISCRIMINATION—See MUNICIPAL CORPORATIONS (2).

DISSOLUTION OF CORPORATION—See RAILROAD COMPANIES (4, 5).

DISSOLUTION OF INJUNCTION—See INJUNCTIONS (1, 3).

DUE PROCESS OF LAW—See CRIMINAL LAW (7); TAXES (3).

DURESS.

A settlement between a lessor and lessee of the amount due for rent is not void for duress because, by the terms of a chattel

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DURESS—Continued.

mortgage given by the lessee to secure the rent, he was prohibited from moving the mortgaged goods to another township, in which he had rented another farm, where nothing was said during the settlement about the mortgage, nor any statement made by the lessee that he paid the disputed amount in order to release his goods. *Lamb* v. *Rathburn*, 666.

See DEEDS (4).

ELECTION OF COUNTS—See PLEADING (3).

ELECTIONS.

1. The decision of a political convention as to the qualifications of its own members is conclusive upon the courts. *Stephenson* v. *Boards of Election Commissioners*, 396.

2. The custom that prevails in political conventions, of permitting the chairman of the party committee to preside until a temporary organization is effected, may be disregarded in a particular convention, although there are contesting delegations, between which, in respect to the right to vote upon matters of organization, the chairman is directed by the committee to decide. *Id.*

3. Courts will not, at least in the absence of a statute imposing the duty, attempt to determine as to which of the nominees of rival factions in a political convention regularly called, neither of which factions appears to have had a majority of the delegates admittedly entitled to seats in the convention, is the regular nominee of the party. *Id.*

4. In such case the names of both nominees, if regularly certified, should be given places upon the ballot, the one with the general ticket of the party, the other in the next column, under the party name and vignette; the board of election commissioners deciding which shall go upon the general ticket. *Id.*

5. The term "general election," as used in Act No. 271, Pub. Acts 1895, § 14, requiring the board of election commissioners in each county to place first on the official ballot the ticket of the party having the greatest number of votes within the county "at the last preceding general election," must be held to mean the November, and not the April, election, since section 2, subd. 19, 1 How. Stat., requires such construction to be given to the term, "unless inconsistent with the manifest intent of the legislature." *Edgar* v. *Board of Election Commissioners of Livingston Co.*, 418.

ELECTRIC RAILWAYS—See STREET RAILWAYS

EMBEZZLEMENT.

An instruction permitting the conviction of a respondent for embezzling the proceeds of a mortgage collected by him, although he received the money before the date of the embezzlement charged in the information, if he held the money at that time as agent for the owner, and within six months

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EMBEZZLEMENT—Continued.

thereafter appropriated the same to his own use, is justified by a letter from the respondent after the collection, but before the date charged, stating that the mortgagor would like to have the mortgage run for the time being, and a letter written within six months after such date, purporting to inclose interest on the mortgage. *People* v. *Gould*, 75.

EMPLOYER AND EMPLOYÉ.

1. The law will protect employers against the unlawful interference of trades unions in their right to employ whom they please, at such prices as they and the persons employed can agree upon, and to discharge them at the expiration of their terms of service or for violation of their contracts. *Beck* v. *Railway Teamsters' Protective Union*, 497.

2. Organization into unions by workingmen for the securing of better and uniform wages, and the use of persuasion to induce other workingmen to join the union, and to refuse to work except for the established wage, and the presentation of their cause to the public in newspapers or circulars, in a peaceable way and with no attempt at coercion, are lawful. *Id.*

3. But the boycotting of one who refuses to accede to the demands of the union is unlawful, where the means used to prevent persons from dealing with the person boycotted are threatening in their nature, and tend naturally to overcome, by fear of loss of property, the will of others, and compel them to do what they would not otherwise do, though unaccompanied by actual violence or threats of violence. *Id.*

4. Injunction will lie to restrain a combination of persons from attempting to ruin complainant's business by bringing to bear upon his customers and employés intimidating and coercive means. *Id.*

5. The picketing of the premises of a person boycotted, for the purpose of intercepting his customers and employés, and the distribution of "boycott circulars," containing statements wholly false as to his relations with his employés, pursuant to an avowed intention of ruining his business, though carried out without violence, are, in themselves, acts of coercion which may be enjoined. *Id.* 498.

6. The duty of equity to enjoin the distribution of boycott circulars under such circumstances is not modified by the fact that under ordinary circumstances, where the destruction of property rights by coercive means is not involved, it cannot, under the Constitution (Const. Mich. art. 4, § 42), enjoin the publication of a libel. *Id.*

7. Testimony by an employé, as to his willingness to continue his services, is immaterial in an action to recover wages for the balance of a contract period in which he performed no work, where it is not claimed that he expressed such willingness to the employer. *Nash* v. *H. R. Gladding Co.*, 529.

8. An employé is not justified in assuming that his contract of employment has been abrogated from the fact that the stock

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EMPLOYER AND EMPLOYÉ—Continued.

and business of his employer have been sold on execution *Id.*

See MASTER AND SERVANT.

ENACTING CLAUSE—See CONSTITUTIONAL LAW (3–5).

ENROLLMENT—See TAXES (12).

EQUITY JURISDICTION.

1. While a court of equity may annul a contract for fraud or mistake, it cannot substitute therefor a different agreement, fixing the liability of the parties upon a basis not contemplated nor assented to by them. *Pittsburgh, etc., Iron Co.* v. *Lake Superior Iron Co.*, 110.

2. While equity, having acquired jurisdiction for other purposes, may order sales of property for the satisfaction of liens as an incident to the general relief, it has no jurisdiction to enforce a lien, whether common law or statutory, upon a bill filed solely for that purpose. *Aldine Manfg. Co.* v. *Phillips*, 162.

3. The fact that an accounting is asked in a bill filed by a corporation to foreclose a lien upon stock under 3 How. Stat. § 4161*b*5, for a debt of the holder, is insufficient to confer such jurisdiction, where there is nothing to show that the claim is not one which a court of law can deal with as an open account. *Id.*

4. Injunction will lie to restrain a township from negotiating railroad-aid bonds, on behalf of any taxpayer of the township whose interest is sufficient to permit him to invoke the aid of equity. *Dodge* v. *Van Buren Circuit Judge*, 189.

5. In such case the petitioner's interest is to be determined with reference, not to the amount of the tax for which he would be made liable because of the bonds, but to the value of his property subject to such taxation. *Id.*

6. A declaration set forth a contract under the terms of which defendant, a corporation, agreed to purchase and protect certain patents in which plaintiff was interested; to continue plaintiff in its employ at a stated salary; and to divide with him annually the net profits of the business in excess of a specified sum. Damages were asked for the wrongful and fraudulent destruction of profits which should have accrued to plaintiff under the contract. There was no allegation that defendant had in its hands profits, money, or property in which plaintiff was entitled to share. *Held*, on demurrer, that no such fiduciary relations were shown as to give equity exclusive jurisdiction. *Church* v. *Anti-Kalsomine Co.*, 219.

7. A bill to restrain defendant from prosecuting an action at law against complainant growing out of a purchase of land on their joint account, which sets up defendant's fraudulent conduct with respect to the purchase, avers that the land is held by complainant as trustee, and asks that an account

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EQUITY JURISDICTION—Continued.

be taken, and a decree rendered establishing the respective rights and interests of the parties, and that the necessary conveyances be directed,—is not demurrable on the ground that complainant's remedy at law is adequate. *Lieberman* v. *Sloman*, 355.

8. If the case made by a bill is clearly of equitable jurisdiction, the court will sustain it, although the formal allegation that complainant has not an adequate remedy at law is omitted. *Id.*

EQUITY PLEADING—See EQUITY JURISDICTION (3, 8).

EQUITY PRACTICE.

1. The right of complainant to correct amendable defects in his bill, upon a demurrer thereto being sustained, is dependent upon his advising the court that he desires to make such amendments. *Aldine Manfg. Co.* v. *Phillips*, 163.

2. Where a cross-bill sets up additional facts relating to the subject-matter of the original bill, and asks affirmative relief upon them, the dismissal of the original bill will not carry with it the cross-bill. *Griffin* v. *Griffin*, 446.

3. While complainant is not bound by a statement of fact in a demurrer, defendant cannot complain if the court, in passing upon the demurrer, assumes it to be true. *Belden* v. *Blackman*, 448.

4. A concession as to the existence of facts not appearing in a bill for an injunction must be regarded as part of the bill. *Bogert* v. *Jackson Circuit Judge*, 457.

See INJUNCTIONS; LACHES; MORTGAGES (3, 6); PARTIES; RES JUDICATA; TAXES (31).

ESCROW.

Where a mortgage is placed in escrow upon the mutual understanding of the parties that it shall be delivered upon the joint request of two persons, one of whom is the mortgagor, the instrument can only be rendered effective by the mortgagor's assenting to its delivery. *Belding Savings Bank* v. *Moore*, 150.

ESTATES IN LAND—See STATUTE OF LIMITATIONS (1).

ESTATES OF DECEDENTS.

1. The necessity for an executor's giving a mortgage upon decedent's property to pay a debt against the estate is not open to inquiry upon a bill to foreclose the mortgage, where the execution of the same was authorized by the probate court upon a petition containing allegations sufficient to confer jurisdiction upon it. *Long* v. *Landman*, 174.

2. Under 3 How. Stat. § 6105, providing that the probate court may authorize the giving of a mortgage for the "purpose of

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ESTATES OF DECEDENTS—Continued.

paying the debts against the estate of any deceased person," such court may authorize a mortgage for the payment of debts and charges accruing after decedent's death. *Id.*

3. It is the duty of an executor to pay the taxes upon real estate of the decedent in his possession pending the settlement of the estate; and, where the available funds of the estate are insufficient for the purpose, he may obtain from the probate court the authority to raise the amount by mortgage upon the land. *Id.*

4. An objection that the amount for which a mortgage was given by an executor, under authority of the probate court, for the payment of debts against the estate, includes improper items, does not go to the validity of the mortgage, and hence will not be considered on foreclosure, but will be left for adjustment in the probate court upon the executor's accounting for the moneys received on the mortgage. *Id.*

See CONSIDERATION (1); LANDLORD AND TENANT (1); WILLS.

ESTOPPEL—See BOUNDARIES (3); DEEDS (4); FIRE INSURANCE (1, 6); GARNISHMENT (3); MUNICIPAL CORPORATIONS (8–10); TRIAL (8); VENDOR AND PURCHASER (5).

EVIDENCE.

1. Testimony that one to whom a statement of account was rendered examined the book from which it was taken, and made no objection to its correctness, renders the book competent as an admission against him. *Raub* v. *Nisbett*, 248.

2. Evidence on a trial for murder, that the accused, shortly after the crime, voluntarily stated that, while attending a medical college, he had strapped a corpse to a buggy seat, after tying its hands and feet together, and had driven with it some distance, is admissible, where the prosecution claims that the condition of the deceased's body when found indicated that it had been so treated. *People* v. *Swartz*, 292.

3. A party who declares upon a contract cannot support it by evidence of its reasonableness until the adverse party has attacked it as unreasonable. *Post* v. *Voorhees*, 366.

4. Testimony of a witness that he knew the price of wheat at C. on a certain day, where his cross-examination did not show that he had no knowledge on the subject, was sufficient to justify the court in submitting the question of such price to the jury. *Carland* v. *Western Union Telegraph Co.*, 370.

5. Plaintiff guaranteed the heating capacity of certain boilers sold by him to defendant when operated with soft coal. In an action for the purchase price, defendant claimed that the boilers required hard coal to be used, and sought to recoup her damages. Plaintiff contended that the failure of the boilers to give satisfaction was due entirely to mismanagement on the part of defendant, and introduced, as bearing upon this issue, the testimony of witnesses who were successfully operat-

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EVIDENCE—Continued.

ing the same kind of boilers with soft coal. *Held*, that the testimony was competent for the purpose offered. *Avery* v. *Burrall*, 672.

See ATTORNEY AND CLIENT (4); BRIDGES (4); EMPLOYER AND EMPLOYÉ (7); JUDGMENTS (1); JURY (2); TAXES (35); TELEGRAPH COMPANIES (5, 6); TRIAL (1, 3, 7); VENDOR AND PURCHASER (6); WITNESSES.

EXECUTION.

1. Shares of stock pledged as collateral security for a debt of the stockholder, and transferred on the books of the company to the pledgee, cannot be sold on an execution against the debtor. *Feige* v. *Burt*, 243.

2. The right to subject shares of stock to execution being purely statutory, the provisions of the statute authorizing it (2 How. Stat. § 7697 *et seq.*) must be strictly complied with. *Id.*

3. An officer who has levied upon a stock of goods may preserve his possession of the same by placing them in charge of a keeper. *Vanosdall* v. *Hamilton*, 533.

4. Where a levy on a stock of goods is made at 8:30 o'clock p. m., when the owner is not present, the officer may take possession of the entire stock, and wait until the next day to make his inventory and to allow the owner to make his selection of exemptions, even though a part of the store building is occupied by the owner as a dwelling. *Id.*

5. A sheriff, acting under an execution, went to the store of the judgment debtor at 8:30 o'clock in the evening of the day on which the execution was issued, and notified the clerk of the fact and purpose of a levy upon the goods, and indorsed the levy upon the execution. On account of the lateness of the hour, he placed the stock in charge of a keeper, and postponed further proceedings to enforce the levy until the following morning. In the meantime the custodian was forcibly ejected by the owner. *Held*, that the levy was valid. *Id.*

6. Upon the return of the officer the next day, he found the stock in the possession of a creditor, who had been given a chattel mortgage the previous evening. Subsequently the officer brought trover for the goods, claiming that he was denied possession by the mortgagee, and that all his efforts to make an appraisal under the execution were thwarted by the debtor's attorney. The mortgagee denied having taken possession of the goods as against the levy, and claimed that he merely took an inventory under a written agreement with the sheriff that the noninterference of the officer should not "waive any rights said sheriff now has to claim a valid levy on said stock of goods;" that he kept possession for no other purpose; but that the sheriff, after such agreement, made no further effort to take possession or perfect the levy. *Held*, that the question whether there was a waiver of the levy was for the jury. *Id.* 534.

See DEEDS (1); TROVER.

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EXECUTION, BILL IN AID OF—See FRAUDULENT CONVEYANCES (2).

EXECUTORS AND ADMINISTRATORS—See CONSIDERATION (1); ESTATES OF DECEDENTS; RECORDING LAWS; STATUTE OF LIMITATIONS (1); WILLS.

EXEMPTIONS—See EXECUTION (4); RAILROAD COMPANIES (10, 11).

EXPERT TESTIMONY—See ATTORNEY AND CLIENT (5); STATUTES (3).

EXPRESS COMPANIES—See CARRIERS.

FALSE REPRESENTATIONS—See VENDOR AND PURCHASER (4–6).

FAMILY MILEAGE—See RAILROAD COMPANIES (9).

FINDINGS OF FACT—See PRACTICE IN CIRCUIT COURT.

FINES—See MUTUAL BENEFIT ASSOCIATIONS.

FIRE INSURANCE.

1. A finding that the insured, at the time of taking out a policy, informed the agent of the insurance company of the location of his property with substantial accuracy, and that, therefore, the company is estopped from asserting a violation of the "clear-space" clause, is justified by evidence that he furnished the agent with a rough diagram approximately showing the correct situation, but which the agent incorrectly copied, and that neither party understood the diagram to be precisely accurate. *Collins* v. *North British, etc., Ins. Co.*, 281.
2. Plaintiff in an action on an insurance policy cannot claim that an arbitration, in which defendant joined with other companies to determine his loss, was, because of the participation of such companies, not an arbitration under the policy in suit, but a common-law arbitration, where the policy of each of the companies was in the standard form, differing from the others only in the name of the company, and the arbitration was such as is provided for therein. *Wicking* v. *Citizens' Mutual Fire Ins. Co.*, 640.
3. That proofs of loss forwarded to and received by the insurer contained no formal address to the company, and failed to state accurately the addresses of other insurers, are objections without force. *Id.*
4. Where the insurer's agents knew the location of a fire, it is immaterial that the proofs of loss failed to state it with exactness. *Id.*
5. The fact that the statement of ownership in proofs of loss was made in the present tense, while the proofs were dated some days later than the fire, does not repel the inference that the statement was understood by the parties to refer to the time of the loss. *Id.*

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FIRE INSURANCE—Continued.

6. Defects in proofs of loss, and insured's refusal to submit to an examination under oath as provided by the policy, are waived by negotiations for settlement being renewed, and insured's going to a place by appointment with and request of the insurer, at an expenditure of time and money, and making a statement of his business, and offering to be questioned under oath. *Id.*

FORECLOSURE—See ESTATES OF DECEDENTS (1, 4); MORTGAGES (3–6).

FORFEITURE—See LIFE INSURANCE (1).

FORGERY.

An instrument reading, "Mr. G., would you let me have [certain property], and I will settle with you," signed "Mrs. S.," is an "order" for property, within the meaning of 2 How. Stat. § 9213, relating to the crime of forgery. *People* v. *Phillips*, 699.

FRAUD—See STATUTE OF FRAUDS; VENDOR AND PURCHASER (4–6).

FRAUDULENT CONVEYANCES.

1. The existence of an actual fraudulent intent at the time a conveyance is made is necessary to be established in order to set the conveyance aside as in fraud of subsequent creditors. *Barkworth* v. *Palmer*, 50.

2. The *prima facie* case which is established under Act No. 99, Pub. Acts 1897, on a bill in aid of execution, by introduction of the judgment, execution, and levy, and proof of the conveyance complained of, may be overcome by convincing testimony that the grant was in fulfillment of an agreement to make the deed in payment of a *bona fide* loan, although the grantee is the debtor's wife. *Keegan* v. *Loranger*, 481.

3. A judgment creditor cannot complain of a transfer by the debtor to his wife of lands the value of which at the time was less than the amount of mortgage and homestead interests therein. *Kozminski* v. *Kuzniak*, 621.

See DEBTOR AND CREDITOR (1); DEEDS (1, 2).

FUTURES, DEALINGS IN—See CONTRACTS (4).

GAMBLING CONTRACTS—See CONTRACTS (4).

GARNISHMENT.

1. The provision of 2 How. Stat. § 8061, giving to the plaintiff in garnishment proceedings the right to bring the garnishee before the circuit judge or a circuit court commissioner for examination, upon a notice of "not less than three nor more than ten days," unless such time is enlarged by the court, has reference to resident garnishees only. *Raniville* v. *Kent Circuit Judge*, 196.

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GARNISHMENT—Continued.

2. The court may, at any time before judgment, permit a garnishee to amend his disclosure, upon due notice to the opposite party. *Dunn* v. *Detroit Savings Bank*, 547.

3. A garnishee bank which, after an alleged defective service of the writ, paid out the deposit of the principal defendant on his outstanding checks, and, upon a subsequent service, filed a disclosure denying liability, is not estopped thereby from showing the exact condition of things at the time of the alleged defective service,—as that the fund was subject to the prior claim of a mortgagee. *Id.*

GENERAL ELECTION, DEFINED—See ELECTIONS (5).

GENERAL ISSUE—See PLEADING (3); REPLEVIN (3).

GRAND JURY—See CRIMINAL LAW (1); INTOXICATING LIQUORS (1).

GUARANTY—See EVIDENCE (5).

HATCHWAYS—See MASTER AND SERVANT (1).

HAWKERS AND PEDDLERS—See MUNICIPAL CORPORATIONS (1-3).

HEARSAY—See ATTORNEY AND CLIENT (4).

HIGHWAYS.

1. The township board has no jurisdiction to hear an appeal from an order of the commissioner of highways laying out a highway until the notices required by the statute are properly served. *Sanger* v. *Township Board of Brownstown*, 19.

2. Where persons aggrieved by the determination of the highway commissioner have duly filed their claim of appeal, and have appeared and prosecuted the same at the time and place designated in the notice served upon them by the township clerk, they have done all that the statute requires of them, and they cannot be deprived of the benefits of their appeal by the failure of the clerk to serve notice upon the commissioner, but are entitled, in case the proceedings on the appeal are set aside for that reason, to another hearing after proper notice. *Id.*

3. A vote at a township meeting, ordering 1 per cent. to be spread upon the tax roll for highway purposes, cannot, where that amount was actually spread upon the roll, be treated as a vote of ½ of 1 per cent. in money, and a vote of highway labor as to the balance, in order to avoid the effect of 1 How. Stat. §§ 1326, 1327, which restrict the money tax for highway purposes to ½ of 1 per cent., but permit an assessment of highway labor at the rate of one-half day on $100 valuation. *Peninsular Savings Bank* v. *Ward*, 87.

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HIGHWAYS—Continued.

4. Nor can it be presumed in such case that a portion of the tax spread was authorized by the board of supervisors under 1 How. Stat. § 483, subd. 15, providing that the board may authorize townships to raise money, by a vote of the electors, for the building or repairing of highways. *Id.*

5. The board of supervisors has no authority to raise a tax for the purpose of repairing, through its own committees or members, State and Territorial roads, thereby invading the jurisdiction of highway commissioners and overseers, whose duty it is to keep them in repair, even if the board has power to vote money for the repair of such roads under any circumstances. *Id.*

See BRIDGES; STREET RAILWAYS.

HOMESTEAD—See FRAUDULENT CONVEYANCES (3).

HOMICIDE—See EVIDENCE (2).

HUSBAND AND WIFE—See DEEDS (2, 3); FRAUDULENT CONVEYANCES (2, 3); VENDOR AND PURCHASER (3).

IDENTITY OF PARTIES—See ATTORNEY AND CLIENT (6, 7).

IMPEACHMENT OF VERDICT—See JURY (2).

INDICTMENT—See INTOXICATING LIQUORS (1).

INJUNCTIONS.

1. *Mandamus* will not be granted to compel the dissolution of a preliminary injunction, where the petition does not show that the court abused its discretion in refusing to dissolve it. *Doud* v. *Mackinac Circuit Judge*, 86; *Briggs* v. *Wayne Circuit Judges*, 200.

2. *Mandamus* will lie to compel a circuit judge to grant an injunction, where it is apparent from his return that his refusal of the writ was based solely upon his opinion that previous decisions of the Supreme Court, which, if followed, would make it clearly his duty to issue the writ, were erroneously decided. *Dodge* v. *Van Buren Circuit Judge*, 189.

3. An application for *mandamus* to compel the dissolution of an injunction will be entertained when questions of law only are involved. *Bogert* v. *Jackson Circuit Judge*, 457.

4. An injunction should not issue to restrain the paving of a street by a municipal corporation, where the only irregularity in the proceedings relates to inequalities in the assessment, which may be corrected without stopping the progress of the work, under a provision of the charter that, when any such assessment is invalid, the council may make a new assessment for the purpose for which the original assessment was made, whether or not the improvement has been completed or any part of the assessment has been paid. *Id.*

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INJUNCTIONS—Continued.

5. A trespass to land which is of a continuing nature, the constant recurrence of which renders the remedy at law inadequate unless by multiplicity of suits, may be relieved against by injunction. *Davis* v. *Township of Frankenlust*, 494.

See EMPLOYER AND EMPLOYÉ (4–6); EQUITY JURISDICTION (4, 5, 7).

INSANE PERSONS.

1. A petition under Act No. 120, Pub. Acts 1897, to have a person adjudged insane by the probate court, need not be verified. *In re Chudek*, 361.

2. Act No. 120, Pub. Acts 1897, amending section 21 of the general law respecting asylums for the insane (3 How. Stat. § 1930*a et seq.*), provides for an appeal "in all cases or proceedings arising under this act." *Held*, that the right of appeal is not limited to cases arising under section 21, which relates to persons not in indigent circumstances, but extends to proceedings under section 23, which treats of indigent insane. *Id.*

3. Under 3 How. Stat. § 1930c8, providing that an unrecovered patient, removed temporarily on trial from the insane asylum, shall not forfeit his right to State support "if returned to the asylum within one year from date of removal," such patient, if returned after the expiration of the year, becomes a charge upon the county. *Lockton* v. *Edwards*, 419.

INSPECTION—See MASTER AND SERVANT (3).

INSTRUCTIONS TO JURY—See CRIMINAL LAW (2, 6, 13); STREET RAILWAYS (2); TRIAL (1, 2, 4–6, 9, 10, 14).

INSURANCE—See AMENDMENTS; FIRE INSURANCE; LIFE INSURANCE.

INTENT—See CRIMINAL LAW (8); FRAUDULENT CONVEYANCES (1); RAILROAD COMPANIES (7).

INTEREST—See USURY.

INTOXICATING LIQUORS.

1. A violation of the state liquor law (Act No. 313, Pub. Acts 1887) is an indictable offense, since the statute does not appoint a particular remedy, or provide a particular method of procedure, exclusive of indictment. *People* v. *Smith*, 78.

2. That a bar is in the same room as an hotel office does not take it out of 3 How. Stat. § 2283*f*4, requiring that all obstructions to the view from the street shall be removed during the times at which the law requires places kept for the sale of liquor to be closed. *People* v. *Carrel*, 79.

See PRINCIPAL AND SURETY (3).

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INVENTORY—See EXECUTION (4).

ISLANDS—See RIPARIAN RIGHTS.

JOINDER OF COUNTS—See PLEADING (1).

JOINT-STOCK ASSOCIATIONS—See CORPORATIONS (3).

JUDGMENTS.

1. Complainant, claiming to have obtained a judgment against defendant before a justice since deceased, was unable to find either the docket or any paper in the case, except one purporting to be an execution and return. He produced this in evidence, and testified that he saw the judgment entered upon the docket, but offered no proof as to the contents of the lost record. *Held*, insufficient to prove the judgment. *Henry* v. *Gates*, 379.

2. The presumption of the validity of a judgment cannot be overcome by an allegation in the answer to a creditor's bill, that the judgment on which the bill is founded was upon notes, in the giving of which defendant "was grossly swindled," that he was not aware of the trial when the case was tried, and that the trial was a conspiracy on the part of complainant and others. *Central National Bank of Cleveland* v. *Graham*, 488.

See PRINCIPAL AND SURETY (3); REPLEVIN.

JUDICIAL NOTICE—See ATTORNEY AND CLIENT (6); BIBLE READINGS (1).

JURISDICTION—See ACCOUNTING; CORPORATIONS (3); COURTS; EQUITY JURISDICTION.

JURY.

1. 2 How. Stat. § 8261, provides that "all cases of * * * collision * * * arising under this act [water-craft act] shall be determined upon the trial or hearing, and upon appeal, according to the principles established in courts of admiralty and maritime jurisdiction in such cases." Section 8281 provides that "the proceedings and practice under this act shall be the same as in personal actions at law, except as herein otherwise provided, so far as the same may be applicable." Section 8259 provides that the trial shall be "by the court without a jury, unless a jury be demanded." *Held*, that the findings of a jury in cases of collision are merely advisory. *McCarthy* v. *Kent Circuit Judge*, 363.

2. An affidavit stating that the affiant was informed by several of the jurors that the jury at first stood three in favor of a verdict for the plaintiff and nine for the defendant, but that they were induced to agree upon a verdict for the plaintiff from the fact that, if they failed to do so, they would be compelled to stay over night in the jury-room, cannot be used to impeach their verdict. *Stevenson* v. *Detroit, etc., R. Co.*, 651.

See CRIMINAL LAW (1, 9, 12); TAXES (5); TRIAL (14).

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JUSTICES OF THE PEACE.

A misjoinder of defendants in justice's court in an action *ex contractu* is not remedied, so as to sustain a verdict rendered in the circuit, upon their appeal, against only one of them, by Circuit Court Rule No. 27 (*c*), adopted pursuant to 2 How. Stat. § 6409, making it the duty of the court to provide rules to prevent the abatement of suits for misjoinder; such rule having no application to cases originating in justice's court. *Wright* v. *Reinelt*, 638.

See JUDGMENTS (1); TOWNSHIPS (2).

LABOR DEBTS.

Debts due to employés in a dry-goods store, who act as department managers and salesmen, and perform such services as the unpacking of goods, marking them and placing them upon the shelves, sweeping out the store, and keeping the stock in order, are debts for labor, within the meaning of 3 How. Stat. § 8749*m*, making labor debts preferred claims under certain circumstances. *Lawton* v. *Richardson*, 669.

See CHATTEL MORTGAGES (2).

LACHES.

A delay by a party to seek relief from a contract, of two and a half years after the overruling of a decision in reliance on which it was made, and of nine months after being informed of such overruling by its attorney, during which time the conditions have so changed that it is impossible to restore the *status quo*, is such laches as will defeat its right to relief. *Pittsburgh, etc., Iron Co.* v. *Lake Superior Iron Co.*, 110.

LAKES.

No fixed rule ever has been or ever can be laid down for the division of the territory covered by inland lakes. Each case must depend upon its own peculiar circumstances and facts, and as reasonable a division arrived at as possible. *Pittsburgh, etc., Iron Co.* v. *Lake Superior Iron Co.*, 109.

LAND CONTRACTS—See STATUTE OF FRAUDS (2); VENDOR AND PURCHASER (2).

LANDLORD AND TENANT.

1. Where lands occupied by a tenant are conveyed by the landlord to his wife a few days before his death, the tenant's liability to account for rent in arrears at the time of the transfer is to the estate of the landlord, and not to the wife. *Williams* v. *Williams*, 477.

2. The fact that defendant in a bill to quiet title lost possession of the lands in suit through the action of complainant's agent in inducing defendant's tenant to surrender possession in order to enable complainant to maintain the bill under 3 How. Stat. § 6626, which authorizes such a suit "against any person not in possession," is no defense, where defendant's

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LANDLORD AND TENANT—Continued.

title had been cut off by a valid tax deed to complainant; the tenant having the right, under such circumstances, to attorn. *Lillie* v. *Snow*, 611.

See CONSIDERATION (2); DURESS; SUMMARY PROCEEDINGS.

LEVY—See EXECUTION.

LIBEL AND SLANDER.

1. Defamatory words uttered by a witness in a criminal proceeding, in response to direct and leading questions put by the attorney for the person against whom they are directed, will not support an action for slander. *Acre* v. *Starkweather*, 214.

2. Where a witness has testified on direct examination that the reputation of defendant for truth and veracity is bad, and is asked, on cross-examination by defendant's counsel, upon what he bases his opinion, his reply that defendant is a thief, —that he stole witness' clothes,—is, as a matter of law, not actionable as slander. *Id.*

3. Whether, in this State, a witness is privileged as to immaterial matter which he may maliciously inject into his testimony,—*quære*. *Id.*

See EMPLOYER AND EMPLOYÉ (6).

LICENSE FEES—See MUNICIPAL CORPORATIONS (1-3).

LIENS.

A lien implies, primarily, simply a right of detention of property until the claim of the person entitled to the lien is satisfied; such person having, in the absence of statute or special agreement, no right to sell the property detained. *Aldine Manfg. Co.* v. *Phillips*, 162.

See EQUITY JURISDICTION (2, 3); MECHANICS' LIENS; REPLEVIN (1, 2).

LIFE INSURANCE.

1. Failure of insured to make a monthly payment on a life-insurance policy does not work a forfeiture, where, at the issuing of the policy, the agent stated that the company would send a collector to the insured's house between the 1st and 10th of each month, to whom the monthly payments should be made, and the insured had the money ready for such collector, who failed to come, and no notification was received that payments should or might be made elsewhere. *Baker* v. *Michigan Mutual Protective Ass'n*, 431.

2. A life-insurance policy was based upon a written application which stated, among other things, that the applicant had never been refused insurance, nor been given an unfavorable opinion by a physician with reference thereto. In an action on the policy, the medical examiner of a benefit association testified that, prior to the application in question, he had

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LIFE INSURANCE—Continued.

examined decedent upon his application for membership in the order, and had found traces of Bright's disease, and had so informed him, but had withheld the report at decedent's request. There was evidence, also, that decedent had told a member of the order that he was ineligible because of the examination. The records of the lodge did not disclose the application, but it was shown that it was not the custom to record applications unless accompanied by the report of the examiner. The only evidence relied on by plaintiff to contradict this showing of misrepresentation was the statements of the insured in his application, and certain statements by the medical examiner as to the result of his examination, claimed to be inconsistent with his testimony. *Held*, that defendant was entitled to have the verdict directed in its favor. *Ferris* v. *Home Life Assurance Co.*, 485.

LIMITATION OF ACTIONS—See STATUTE OF LIMITATIONS.

LIQUOR TRAFFIC—See INTOXICATING LIQUORS.

LOGS AND LOGGING.

The fact that delivery of logs by a boom company was delayed until the fall storms had rendered transportation dangerous has no bearing upon the reasonableness of its charges, since the cost of its services could be no less in such season, and the reasonableness of a charge for labor, where no claim is made that it was not well done, depends simply upon the cost of the work and a reasonable profit. *Escanaba Boom Co.* v. *Two Rivers Manfg. Co.*, 454.

LOST RECORD—See JUDGMENTS (1).

MALPRACTICE—See NEGLIGENCE (1).

MANDAMUS.

Mandamus will not lie to set aside an order that is appealable. *Mardian* v. *Wayne Circuit Judge*, 353; *Devine* v. *Wayne Circuit Judge*, 354.

See CARRIERS (1, 4); CORPORATIONS (3); INJUNCTIONS (1–3).

MARGINS, PURCHASE ON—See CONTRACTS (4).

MASTER AND SERVANT.

1. A servant who is taken temporarily from the work for which he is regularly employed, and is set to doing work of a different kind, in a strange place, has a right to assume, in the absence of any caution or warning, that there are no circumstances unknown to him, and known to the master, which render his new place of work unusually dangerous. So *held*, where an oiler on a ferryboat, in which the hatchways were always covered when not in use, was directed to perform a different kind of work on another boat, which was out of commission, without his knowing or being informed of a cus-

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MASTER AND SERVANT—Continued.

tom of leaving the hatchways open on boats out of commission. *Brown* v. *Ann Arbor Railroad Co.*, 205.

2. Defendant provided certain of its employés with a simple tool, called a "snap-hammer," for use in riveting. The tool was made by a competent blacksmith, from proper material. The employés who used the hammer were skilled mechanics, as competent as any one to decide when it became out of repair, and were at liberty at any time to have it repaired or replaced by a new one. A chip from the hammer struck plaintiff and injured him. It did not appear that an inspection before the accident would have disclosed any defect. *Held*, that defendant was not liable. *Wachsmuth* v. *Shaw Electric Crane Co.*, 275.

3. The duty of inspection, by an employer, of the appliances used by his employés, does not extend to the small and common tools in everyday use, of the fitness for use of which the employés using them may reasonably be supposed to be competent judges. *Id.* 276.

See EMPLOYER AND EMPLOYÉ.

MECHANICS' LIENS.

1. Under the mechanic's lien law (Act No. 179, Pub. Acts 1891, as amended), a subcontractor, material man, or laborer is entitled to a lien only for his *pro rata* share of the contract price, where the same is less than the cost to the contractor. *Blitz* v. *Fields*, 85.

2. The failure of a building contractor to furnish to the owner a sworn statement as to the amounts due to subcontractors, laborers, and material men, as required by the lien law (Act No. 179, Pub. Acts 1891, § 4), will not prevent his recovery on the contract, where it appears conclusively that none of such persons are in a condition to assert a lien, or to subject the owner to litigation. So *held*, where suit was commenced more than two years after the work had been accepted by the owner. *Walker* v. *Syms*, 183.

MENTAL COMPETENCY—See DEEDS (3).

MICHIGAN CENTRAL CHARTER—See RAILROAD COMPANIES (8–5, 8, 9).

MILEAGE TICKETS—See RAILROAD COMPANIES (9).

MINING COMPANIES—See CORPORATIONS (2).

MISJOINDER—See JUSTICES OF THE PEACE.

MISTAKE.

Contracts made on the faith of the law as enunciated in a decision of a court of last resort, in the absence of fraud, misrepresentation, or want of knowledge of all the facts, will not be set aside because of a subsequent decision by the same

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MISTAKE—Continued.

court overruling the former one, since a mistake of law is no ground for relief. *Pittsburgh, etc., Iron Co.* v. *Lake Superior Iron Co.*, 109.

MORTGAGES.

1. Complainant and his brothers comprised a corporation which owned certain boats, worth approximately $30,000, that had been libeled and were about to be sold. One of the brothers arranged with K. to advance $10,000 to bid in the boats, under an agreement that he should hold the title to the boats as security for a time, during which such brother was to retain possession; in consideration of which service K. was to receive, upon redemption of the boats, $11,000. K. bid in one of the boats for $13,050, and received a bill of sale of the other from the corporation. It was known to K. that the money to redeem the boats, over and above the $10,000 paid by him, was furnished by complainant. *Held*, that the transaction amounted to a conveyance to K. in trust for complainant, with an interest in K. in the nature of a mortgage interest. *Murphy* v. *Charlton*, 141.

2. A sale by K. to defendant, negotiated by the brother in possession, who received nothing therefor, entitled defendant merely to hold in the right of K., subject to complainant's equities; at least if, in subsequent negotiations, the fact that complainant had equities in the boats was recognized by defendant. *Id.*

3. Under 2 How. Stat. § 6702, authorizing the court in foreclosure proceedings to render a personal decree against the mortgagor for a deficiency "on the coming in of the report of sale," a provision in the original decree that the mortgagor shall be personally liable for a deficiency, "if any," is insufficient; the statute contemplating a supplemental petition, with notice to the mortgagor. *Prentis* v. *Richardson's Estate*, 259.

4. A mortgagor who receives a discharge in bankruptcy pending foreclosure proceedings is not liable to a decree for deficiency. *Id.*

5. An irregular foreclosure sale does not extinguish the mortgage, but operates to transfer to the purchaser the rights of the mortgagee. *Kelsey* v. *Ming*, 438.

6. A personal decree upon a bill to foreclose a mortgage will not be granted against one to whom the mortgagor conveyed the mortgaged premises by a deed given as security for the former's promise, in a separate written agreement, to pay the mortgage in case payment should be demanded by the mortgagee, where the latter was not a party to such agreement, and it could not be enforced in favor of the mortgagor because of his breach of its conditions. *Webber* v. *Lawrence*, 630.

See CHATTEL MORTGAGES; CONSIDERATION (1); DEBTOR AND CREDITOR (2); ESCROW; ESTATES OF DECEDENTS; PRINCIPAL AND AGENT (1, 3); SETTLEMENT (2); TAXES (15).

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MUNICIPAL CORPORATIONS.

ORDINANCES AND RESOLUTIONS: VETO POWER.

1. A city ordinance requiring hawkers and peddlers to pay an annual license fee of $5 for peddling on foot or from a stand, of $25 for peddling from a hand-cart or from a conveyance drawn by one horse or other animal, and of $50 where more than one animal is used, the licenses to be issued for one year from June 1st, or such portion of the year as intervenes between the issuance and June 1st ensuing, is not unreasonable. *People* v. *Hotchkiss*, 59.

2. Such an ordinance is not void as discriminatory and in restraint of trade. *Id.*

3. Such ordinance is uniform, in that it provides for a license by the year or part of the year. *Id.*

4. Under Act No. 215, Pub. Acts 1895, chap. 9, § 3, giving the mayor of a city of the fourth class three days after the passage of an ordinance or resolution by the council within which he may lodge his veto in the office of the clerk, the placing of a veto in the hands of the clerk at his residence in the evening, within the prescribed time, after making an ineffectual attempt to gain admittance to his office in the afternoon, is sufficient to give the veto effect. *Baar* v. *Kirby*, 392.

5. Under the further provision of the same section that "no ordinance or resolution" shall have any effect in such case unless passed over the veto, a resolution transferring moneys from the contingent to a special fund may be vetoed. *Id.*

AUTHORITY OF OFFICERS: CONTROL OF STREETS.

6. The common council of a city is not bound to assent to the use by a street-railway company of a "Y" switch, which the company constructed between midnight Saturday and midnight Sunday, at the intersection of two of the principal business streets, for the purpose of turning its cars thereon, because the mayor and a member of the street committee had prior knowledge that such a switch was proposed. *Rapid Railway Co.* v. *City of Mt. Clemens*, 133.

See STREET RAILWAYS (3, 4).

PUBLIC IMPROVEMENTS.

7. Under a statute authorizing a city to levy the cost of an improvement upon adjacent property "by foot frontage, according to benefits, or by land values, as the common council shall determine," an assessment based on the value of each parcel "exclusive of improvements" is void. *Walker* v. *City of Ann Arbor*, 251.

See INJUNCTIONS (4).

PRESENTATION OF CLAIMS TO COUNCIL.

8. A claim for injury to land having been presented to a village council at the request of one of the trustees, a committee was appointed to investigate it, who caused a survey to be made for the purpose of ascertaining the amount of damages, and the council referred the matter to the president for

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MUNICIPAL CORPORATIONS — *Presentation of Claims to Council*— Continued.

settlement. At his request, the claimant appeared before him, and tried to make an adjustment, objection being made to the amount of the claim. No objection was raised that it was not verified and itemized, as provided by Act No. 3, Pub. Acts 1895, chap. 5, § 7, until the village filed its plea in a suit to enforce the claim. *Held*, that it was a question for the jury as to whether the council had waived the defense. *Wright* v. *Village of Portland*, 23.

9. A city cannot set up as a defense to an action for personal injuries that the plaintiff has not brought himself within an amendment of its charter requiring "existing causes of action" to be prosecuted within a specified time after the amendment takes effect, where, by other provisions of the charter, it is made a sufficient defense to any such action that it was brought before the common council had a reasonable time to investigate and pass upon the claim, and the delay in the particular case was occasioned by the investigations on the part of the council. *Springer* v. *City of Detroit*, 69.

10. In such case the council will be assumed to have placed its own interpretation upon what constituted a reasonable time in view of the circumstances, and the city is estopped to contend that, because of its action in so prolonging its investigations, suit might have been maintained by the plaintiff upon his claim before the council had finally passed upon it. *Id.*

11. Presentation to the common council of a village of a verified statement of claim for personal injuries, required by Act No. 3, Pub. Acts 1895, chap. 5, § 7, before suit can be maintained therefor, is not waived by the council's agreeing to arbitrate, if the person injured refuses to proceed under the arbitration agreement. *Clark* v. *Village of Davison*, 420.

See PLEADING (3).

MUTUAL BENEFIT ASSOCIATIONS.

1. The by-laws of a benefit society provided that fines imposed on members should be added to the dues, that members should be notified of arrearages, and that "the expulsion of a member shall take place for the following offenses: (*a*) A member who has not paid all of his dues and fines at the monthly meeting." A fine having been imposed on a member, it was added to his dues, and, not being paid after notice, he was expelled. *Held*, that the expulsion was valid. *Simek* v. *Bohemian Society*, 81.

2. The question whether a benefit society ratified the action of its president in imposing a fine upon a member becomes immaterial if an order of expulsion for nonpayment of the fine is so ratified. *Id.*

3. A member of a benefit society waives the requirement of the by-laws that a notice of expulsion shall be sent by registered letter, where he receives an unregistered letter, and acts upon it by appealing to the grand lodge from the order of expulsion made by the subordinate lodge. *Id.*

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NEGLIGENCE.

1. Plaintiff, who had treated with defendant, a physician and surgeon, for a disease affecting particularly his right leg, upon defendant's advice, went to the hospital for an operation. Under plaintiff's directions, the right leg was prepared by a nurse, and he was placed under the influence of chloroform. Defendant, believing the wrong leg had been prepared by mistake, asked plaintiff's brother which leg plaintiff wished operated on. The brother, being unable to tell, requested defendant to wait until he could telephone plaintiff's family, which defendant consented to do. While the brother was at the telephone, plaintiff's father arrived, and said that the left leg was the one, and defendant proceeded to operate on that leg. There was evidence that the right leg was discolored and inflamed, while the left one was not. *Held*, that the question of defendant's negligence was for the jury. *Sullivan* v. *McGraw*, 39.

2. The question as to whether a purchaser of tanks for the purpose of storing cider therein should, as a reasonably prudent man, have taken warning from the bursting of a lug on the empty tank, and removed his cider from the other tank, which subsequently burst, is for the jury, where the vendor assumed to account for the first break, and assured the purchaser that the tanks were all right. *Tatro* v. *Brower*, 615.

See BRIDGES; MASTER AND SERVANT; STREET RAILWAYS (1, 2, 5).

NEGOTIABLE PAPER—See PRINCIPAL AND AGENT (3).

NEW TRIAL.

Under Act No. 134, Pub. Acts 1893, providing that there may be incorporated in the bill of exceptions a record of the proceedings on motion for a new trial, including the reasons for the refusal thereof, and that exceptions may be taken and error assigned thereon, the action of the trial court in refusing a new trial cannot be reviewed on appeal, if the bill of exceptions does not contain the order of refusal, the reasons therefor, and exceptions to the decision. *Stevenson* v. *Detroit, etc., R. Co.*, 651.

See CRIMINAL LAW (4).

NONRESIDENTS—See GARNISHMENT (1).

NOTICE—See BRIDGES (1-3); DEBTOR AND CREDITOR (2); GARNISHMENT (1); HIGHWAYS (1, 2); RECORDING LAWS; SUMMARY PROCEEDINGS; TAXES (3, 20, 34).

NOTICE, JUDICIAL—See ATTORNEY AND CLIENT (6); BIBLE READINGS (1).

OBLIGATION OF CONTRACTS—See RAILROAD COMPANIES (2).

OFFER OF JUDGMENT—See WITNESSES (1).

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OFFICERS—See PUBLIC OFFICERS.

OFFICIAL BALLOTS—See ELECTIONS (4, 5).

OLEOMARGARINE LAW—See CONSTITUTIONAL LAW (6).

ORDER FOR PROPERTY—See FORGERY.

ORDINANCES—See MUNICIPAL CORPORATIONS (1–5); STREET RAILWAYS (4).

PARTIES.

A bill to declare a mortgage placed in escrow a prior lien over a deed to a trustee for the benefit of an insolvent bank will not be dismissed for failure to make the bank and its receiver parties, where the trustee is made a party, and enters fully upon the defense claimed by the *cestui que trust*. *Belding Savings Bank* v. *Moore*, 150.

See CARRIERS (4); PRINCIPAL AND SURETY (2); TAXES (14).

PARTITION—See LAKES.

PART PERFORMANCE—See SPECIFIC PERFORMANCE.

PAYMENTS.

Payments made upon an account for materials furnished to a paving contractor for use in several improvements, in the absence of any application by the parties, will be applied to the charges in the order of their date. *People, for use of Holmes*, v. *Sheehan*, 539.

See LIFE INSURANCE (1); PRINCIPAL AND AGENT (3, 4); TAXES (7, 11, 16, 40); USURY.

PEDDLERS—See MUNICIPAL CORPORATIONS (1–3).

PERSONAL INJURIES—See MASTER AND SERVANT; MUNICIPAL CORPORATIONS (9–11); PLEADING (3); STREET RAILWAYS (1, 2, 5); TRIAL (11–13).

PHYSICIANS AND SURGEONS—See NEGLIGENCE (1).

PICKETS—See EMPLOYER AND EMPLOYE (5).

PLEADING.

1. A special count in *assumpsit* may be joined with the common counts. *Carland* v. *Western Union Telegraph Co.*, 369.

2. Where the common counts were practically abandoned, there being nothing in the case to support them, it was not necessary to compel an election of counts. *Id.*

3. In an action against a village for personal injuries, the defense that plaintiff failed to present a verified claim to the village council before commencing suit, as required by Act No. 3,

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PLEADING—Continued.

Pub. Acts 1895, chap. 5, § 7, may be asserted under the plea of the general issue. *Clark* v. *Village of Davison*, 420.

See ACTIONS; AMENDMENTS; GARNISHMENT (2); INSANE PERSONS (1); REPLEVIN (3).

PLEDGE.

1. A pledgee of shares of stock indorsed in blank may protect his special property therein by having the same transferred on the books of the company, and new stock issued in his name; but if he goes further, and uses such stock as if it were his own, he is guilty of a conversion. *Feige* v. *Burt*, 243.

2. While stock pledged to secure the payment of a debt may, in case of default, be sold by the pledgee, without judicial proceedings, upon notice to the pledgor, a sale without notice constitutes a conversion. *Id.*

3. When a pledgee of stock wrongfully sells it, the pledgor may sue for the conversion without first tendering the debt or demanding a return of the stock. *Id.*

4. In such action the pledgee is entitled to recoup the amount of the debt. *Id.*

See EXECUTION (1).

POLITICAL CONVENTIONS—See ELECTIONS (1–4).

POSSESSION OF LANDS—See CORPORATIONS (1); LANDLORD AND TENANT (2); STATUTE OF LIMITATIONS (1); SUMMARY PROCEEDINGS.

POSSESSION OF PERSONALTY—See EXECUTION (3–6).

PRACTICE IN CIRCUIT COURT.

1. Findings of fact and law are not authorized after final judgment, unless such judgment is vacated for the purpose on proper showing. *Stafford* v. *Crawford*, 285.

2. Failure to file exceptions to findings precludes the raising of any question on appeal save that of whether the findings support the judgment. *Id.*

See GARNISHMENT (2); JURY (1); JUSTICES OF THE PEACE; TRIAL.

PRACTICE IN SUPREME COURT—See APPEAL AND ERROR.

PREFERENCES—See DEBTOR AND CREDITOR (1); LABOR DEBTS.

PRESUMPTIONS—See BRIDGES (2); JUDGMENTS (2); TELEGRAPH COMPANIES (3).

PRINCIPAL AND AGENT.

1. R. purchased real estate, taking title in his wife's name.

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PRINCIPAL AND AGENT—Continued.

Subsequently he put the property in the hands of a real-estate broker, who sold the same on credit, and secured the purchase price by a note and mortgage, which he drafted, running to the wife of R. Thereafter the mortgagee executed a discharge, and R. forwarded it to the broker, who received payment in full from the mortgagor. *Held*, that the broker could not claim that in the collection he was the agent of R., and not of R.'s wife. *People* v. *Gould*, 75.

2. Evidence that defendant in an action to recover for plastering a house told plaintiff that he would leave it all to a third person to look after the business for him is sufficient for the submission to the jury of the question of the agency of such third person. *Wilhelm* v. *Voss*, 106.

3. A negotiable note and mortgage were assigned to a nonresident, with the knowledge of the grantee of the mortgagor. The assignee usually sent to the mortgagee to collect interest as it fell due, and the proceeds of such collections were remitted. On one occasion the assignee authorized the mortgagee to receive and remit a payment upon the principal, which the debtor had expressed a desire to make. Thereafter the debtor, relying on the mortgagee's representation that he was the agent of the assignee, made a further payment on the principal. The assignee retained possession of the mortgage and note, and the mortgagee gave receipts in his own name. The latter never accounted for the last payment on the principal. *Held*, that no general authority to collect appeared, and that the payment was at the debtor's risk. *Bacon* v. *Pomeroy*, 145.

4. A creditor's statement to his debtor, after the latter has made an unauthorized payment of the debt to a third person, that the debt is discharged and the evidence of the same destroyed, does not necessarily show a ratification, its weight being for the jury. *Barnett* v. *Saloman*, 460.

See CORPORATIONS (1); SETTLEMENT (2); TELEGRAPH COMPANIES (4, 6).

PRINCIPAL AND SURETY.

1. Sureties upon the bond of a paving contractor are not liable for material purchased for the improvement, but subsequently rejected, and sold to other parties. *People, for use of Holmes*, v. *Sheehan*, 539.

2. Dealers in paving materials, who have supplied contractors with stone used for distinct improvements, in respect to which separate bonds were given, cannot, in an action to recover a balance due, join all the sureties upon the different bonds, but should bring separate actions for the balance due on each improvement against those liable therefor. *Id.*

3. An action for civil damages against a saloon keeper and his bondsmen is joint, and a remission by plaintiff of so much of a judgment recovered in such action as is in excess of the penalty of the bond inures to the benefit of the principal as well as of the sureties. *Lafler* v. *Monroe Circuit Judge*, 677.

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PRIVILEGE—See LIBEL AND SLANDER.

PROBATE COURTS—See ESTATES OF DECEDENTS; INSANE PERSONS; WILLS.

PRO CONFESSO—See TAXES (23).

PROOFS OF LOSS—See FIRE INSURANCE (3–6).

PUBLICATION—See TAXES (3, 32).

PUBLIC IMPROVEMENTS—See INJUNCTIONS (4); MUNICIPAL CORPORATIONS (7); PRINCIPAL AND SURETY (1, 2).

PUBLIC LANDS—See RIPARIAN RIGHTS.

PUBLIC OFFICERS.

2 How. Stat. § 7549, providing that suits against public officers, based on official acts, shall be brought in the county where the cause of action arises, sustains the right of one whose lands are flooded by the action of highway officers of another county to sue in the county in which his lands are situated, although the water is set in motion in such other county, since no trespass is consummated until the water reaches the lands. *Davis* v. *Township of Frankenlust*, 494.

See EXECUTION (3–6); MUNICIPAL CORPORATIONS (6).

PUBLIC POLICY—See STATUTES (2).

QUIETING TITLE—See LANDLORD AND TENANT (2).

QUITCLAIM DEED—See VENDOR AND PURCHASER (1).

RAILROAD COMPANIES.

1. The legislature has the power, within certain limits, to regulate the rates to be charged by railroad companies for transportation. *Pingree* v. *Michigan Central R. Co.*, 314.

2. But the power to fix rates within a prescribed maximum may be so directly conferred upon a company by its charter as to render interference by subsequent legislatures an impairment of the obligation of a contract. *Id.*

3. Section 15 of the Michigan Central charter (Act No. 42, Laws 1846) provides that it shall be lawful for the company, from time to time, to fix, regulate, and receive the tolls and charges to be taken for the transportation of property and persons on its road, *subject only* to a limitation as to passengers of three cents a mile, and ten cents in addition on distances not exceeding thirty miles. But section 11 contains the provision that "the said company shall have power to charge for tolls and transportation such sums as shall be *lawfully* established by the by-laws of said company;" and section 30 confers upon the board of directors the power to pass all by-laws necessary to carry into execution the powers vested in the company: "*Provided*, such by-laws shall not

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RAILROAD COMPANIES—Continued.

be contrary to the Constitution or laws of the United States or of this State." *Held*, that section 15 confers upon the company the contract right to regulate the rate of charges for the transportation of passengers, within the limit of three cents per mile, and that such right is not qualified by sections 11 and 30. *Id.*

4. In 1846 the Michigan Central Railroad Company became a corporation, with the right under its charter to operate a railroad within the borders of the State, the State reserving an option to repurchase upon specified terms. By Act No. 197, Laws 1848, the legislature authorized the corporation to build and operate a railroad from the southern line of the State to Chicago. *Held*, that, even if the option of the State was impliedly repealed by reason of the later act destroying the basis of fixing the price, such an enlargement of the corporate powers did not operate to dissolve the original corporation, and create a new and different one. *Id.* 315.

5. Act No. 139, Laws 1855, authorizing said company to build a double track, and to sell bonds therefor, and to make business contracts with other railroads, organized or to be organized, for the operation thereof by said company, did not dissolve the corporation, and create a new corporation, subject to the provision of the Constitution of 1850 reserving to the legislature the power to amend, alter, or repeal the charters of all corporations afterwards created. *Id.*

6. Statutes authorizing the consolidation of railroads must be substantially complied with in order to effect the formation of a new corporation. *Id.*

7. Where the enabling act is ambiguous or uncertain, the intent of the companies may be an important consideration in determining whether a consolidation has been effected in a given case. *Id.*

8. The Michigan Central Company, by availing itself of special statutory authority to make business arrangements with other companies, with a view to operating their roads as branch lines, did not effect a consolidation with such companies, so as to become merged in a new corporation under the terms of the general statute. *Id.* 316.

9. Act No. 90, Pub. Acts 1891, providing for the issuance of family mileage tickets, cannot be deemed an exercise of the power of amendment reserved in the charter of said company, subject to the provision that the company should be compensated for all damages sustained by reason of amendment, as it does not purport to be an amendment of the charter, and contains no provision for compensating the company for the loss of its exclusive right under the charter to fix its fares. *Id.*

10. A statute extending to railroads building and operating lines within a specified territory a partial exemption from taxation does not create a contract, but confers a gratuitous privilege, revocable at the pleasure of the State. *Manistee, etc., R. Co.* v. *Commissioner of Railroads*, 349.

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RAILROAD COMPANIES—Continued.

11. The repeal by Act No. 228, Pub. Acts 1897, of the partial exemption from taxation extended to certain railroad companies by Act No. 174, Pub. Acts 1891, and Act No. 129, Pub. Acts 1893, does not deprive such companies of their exemption up to the time the repealing act took effect. *Id.*

See DEPOT COMPANIES; STREET RAILWAYS; TAXES (19).

RATIFICATION—See MUTUAL BENEFIT ASSOCIATIONS (2); PRINCIPAL AND AGENT (4).

REAL-ESTATE BROKERS—See PRINCIPAL AND AGENT (1).

REASONABLE DOUBT—See CRIMINAL LAW (6).

REASONABLENESS: OF CHARGES—See LOGS AND LOGGING.

OF CONTRACT—See EVIDENCE (3).

OF ORDINANCES—See MUNICIPAL CORPORATIONS (1).

OF STATUTES—See STATUTES (2, 3).

RECEIPTS.

Where the trustee of an infant's estate, upon the beneficiary's becoming of age, rendered him an account, and the latter, having no personal knowledge of the transactions, gave his receipt upon the basis fixed by such account, and subsequently, after the trustee's death, it was discovered, upon an examination of the books by an expert accountant, whose finding was given by stipulation the force of that of a referee, that, at the time the receipt was given, a large amount remained in the trustee's hands unaccounted for, the finding so far overcame the *prima facie* effect of the receipt as to leave no room for an inference inconsistent with liability. *Jones* v. *Home Savings Bank*, 155.

RECEIVERS.

1. An order appointing a receiver, whereby the possession of property is divested, is appealable. *Mardian* v. *Wayne Circuit Judge*, 353; *Devine* v. *Wayne Circuit Judge*, 354.

2. A summons may be issued against a judgment debtor against whom a creditor's bill is pending, and for whom a receiver has been appointed, requiring him to appear before a circuit court commissioner for examination, although proof has not been made of service of the order appointing a receiver, where such order, a copy of which is before the commissioner, directs him to issue a summons on request. *Central National Bank of Cleveland* v. *Graham*, 488.

3. A judgment debtor for whom a receiver has been appointed may be adjudged guilty of contempt in disobeying an order to attend a hearing before a circuit court commissioner for examination, although a petition taken by him to

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RECEIVERS—Continued.

stay the receivership proceedings is pending, where no temporary stay preventing the judgment creditor from proceeding has been made. *Id.* 489.

RECORDING LAWS.

Evidence of record that an executrix sold property of the estate under license of the probate court, and, on the day after the sale was confirmed and the deed executed, took a quitclaim deed to herself from the purchaser, is notice, *it seems*, that she was indirectly interested in the sale, contrary to the statute (2 How. Stat. § 6042). *Litchfield* v. *Tunnicliff*, 383.

See DEEDS (1).

RECOUPMENT—See PLEDGE (4); SALE (4); VENDOR AND PURCHASER (5).

REDEMPTION—See TAXES (11, 38, 40).

REFERENCE—See ACCOUNTING (2); RECEIPTS.

RELEASE AND DISCHARGE—See RECEIPTS.

RELIGIOUS FREEDOM—See BIBLE READINGS (2–4).

RELIGIOUS MEETINGS—See SCHOOLS AND SCHOOL DISTRICTS (1).

REMARKS OF COUNSEL—See APPEAL AND ERROR (1); CRIMINAL LAW (5); TRIAL (11–13).

REPEAL OF STATUTE—See RAILROAD COMPANIES (11).

REPLEVIN.

1. Where a mortgagee establishes his claim in replevin by him for the mortgaged property, which has been regularly sold by him for less than the amount of his lien, a verdict for six cents damages is properly directed in his favor. *Vincent* v. *Sherwood*, 64.

2. Valid liens existing upon replevied property at the time the suit was commenced are not extinguished, nor is their priority affected, by the exercise by the defendant of his right to waive a return of the property, and have its value assessed, since this right is expressly declared by the statute conferring it (2 How. Stat. § 8347) to be subject to section 8342, providing that, where either party to an action in replevin has a lien upon the property, such fact shall be determined, and such judgment shall be rendered as shall be just between the parties. *Kelsey* v. *Ming*, 438.

3. A verdict in replevin, simply that "defendant did not unlawfully detain," based on a plea of the general issue, which, under 2 How. Stat. § 8339, puts in issue, not only the detention of the property, but also the property of plaintiff therein,

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REPLEVIN—Continued.

and his right to possession at the time of the commencement of the suit, does not entitle defendant to a return of the property. *Harris* v. *O'Gorman*, 553.

See RES JUDICATA (1); TAXES (39).

REPORT OF SALE—See TAXES (10, 13, 29).

REPORTER'S MINUTES—See APPEAL AND ERROR (1).

REQUESTS TO CHARGE—See TRIAL (4, 9).

RES JUDICATA.

1. In replevin for mortgaged chattels, the following facts appeared: That one H., to whom the mortgage was given, which purported to be security for H.'s indorsement of defendant's note, had some time previously petitioned the court asking that an injunction theretofore obtained by plaintiff, who held a mortgage on defendant's real estate and was the payee in the aforesaid note, restraining defendant from cutting timber on the mortgaged premises, be modified to the extent of allowing sufficient to be cut to pay the said note; that the court refused to modify the injunction, but ordered H. to assign the chattel mortgage to plaintiff, whom he subrogated to all the rights of H. therein, and directed plaintiff to sell the property, and release H. to the extent of the amount realized; that defendant thereupon filed a petition to have the order vacated on the grounds, among others, that he (defendant) was interested in the proceedings, and had had no opportunity to be heard, that plaintiff had agreed that defendant might cut and sell the timber, and that the mortgage to H. was to indemnify him against loss should defendant fail to apply on the note the proceeds of the sales; that the defendant's petition was denied by the circuit judge; and that no appeal was taken. *Held*, that the questions involved in the proceedings in equity were *res judicata*. *Vincent* v. *Sherwood*, 64.

2. A decree dismissing, after a hearing on the merits, a bill to set aside for fraud a written agreement as to the compensation to be allowed by complainant to defendant as her attorney, is conclusive of the validity of the agreement, when attacked upon the same ground in a subsequent proceeding. *Moran* v. *L'Etourneau*, 159.

RESTRAINT OF TRADE—See MUNICIPAL CORPORATIONS (2).

RETURN OF PROPERTY—See REPLEVIN (2, 3).

REVENUE STAMPS—See CARRIERS (2–4); COURTS.

RIPARIAN RIGHTS.

Under a deed of land bounded by a meandered river, the grantee, *prima facie*, takes title to the middle thread of the main channel of the stream, and may maintain his right to a

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RIPARIAN RIGHTS—Continued.

so-called "island" lying between such channel and the main land, as against one who, claiming through deeds of the "island," fails to show that the government ever surveyed or treated the intervening land as such. *Goff* v. *Cougle*, 307.

See LAKES.

SALE.

1. Where one person has agreed to sell and another to buy a specific and designated article, the law, in the absence of any manifestation of a contrary intention, presumes a sale to have been effected; delivery not being essential to the passing of title as between the parties and their privies. *People, for use of Holmes*, v. *Sheehan*, 589.
2. Under an agreement whereby S., a contractor, was to select curbstone at H.'s yard, "and when the curbstone was thus picked out, and delivered to S., it should belong to S., and H. would have nothing more to do with it," title passed when the stone was selected at the yard, although H. was to transport it when requested. *Id.*
3. The right to recover the purchase price of goods sold upon a week-day is not affected by the fact that delivery was made on Sunday. *Id.*
4. The burden of showing that a steam-heating plant does not meet the requirements of the contract of purchase is upon the vendee in an action against her to recover the balance of the purchase price, where she has accepted and used the plant, and seeks to recoup in the action the amount of her damages for its failure properly to perform the work. *Avery* v. *Burrall*, 672.

See ACTIONS (2); EVIDENCE (5); NEGLIGENCE (2); PLEDGE; TAXES.

SCHOOLS AND SCHOOL DISTRICTS.

1. The voters of a school district, at a meeting properly called and held, are authorized to prohibit the use of the school-house for the purpose of holding religious meetings. *Eckhardt* v. *Darby*, 199.
2. A school board's contract with a teacher to employ her for the fall term, and to give her a contract for five months longer if she gives satisfaction, will not bind the district to re-employ the teacher, though her fall's work prove satisfactory, if her certificate, without which under the school law no one is authorized to teach, has less than five months to run. *O'Leary* v. *School District No. 4 of Bridgeport Township*, 469.

See BIBLE READINGS.

SELF-DEFENSE—See CRIMINAL LAW (13).

SERVICE OF PROCESS—See GARNISHMENT (1, 3); TAXES (3).

SETTLEMENT.

1. A written adjustment of accounts between a lumber company

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SETTLEMENT—Continued.

and a boom company, which leaves open, as "the sole question" for future determination, whether any price for the services of the boom company over and above the rate at which payment is made by the lumber company, up to the rate claimed by the boom company, is a "reasonable" price, the lumber company admitting its liability if the reasonableness of the demand shall be determined, precludes the latter company from afterwards asserting a claim of recoupment for damages occasioned by delay in the performance of the work *Escanaba Boom Co.* v. *Two Rivers Manfg. Co.*, 454.

2. A bill to foreclose a mortgage cannot be maintained, where the authorized agent of the mortgagee delivered to the mortgagor, for a valuable consideration, the notes secured by the mortgage, with the understanding that a settlement of the mortgage was fully consummated, leaving nothing to be done but the delivery of the discharge of the mortgage, although the mortgagee thereafter attempted to repudiate the settlement. *Lindley* v. *Lupton*, 466.

3. A settlement of conflicting claims, made with full knowledge of the facts, is conclusive upon the parties. *Lamb* v. *Rathburn*, 666.

See DURESS; RECEIPTS.

SHERIFFS—See EXECUTION (3–6).

SLANDER—See LIBEL AND SLANDER.

SPECIFIC PERFORMANCE.

Complainant, after deeding land to defendant upon the parol understanding that defendant should give back a "life-lease deed" to complainant, by the terms of which they might occupy the land together until the death of either, when the title should vest in the survivor, continued to live upon the premises with defendant, and to expend labor and money for the betterment of the land. *Held*, that there was such part performance as entitled complainant, upon defendant's refusal to execute the deed, to maintain a bill under 2 How. Stat. § 6183, for specific performance. *Bushnell* v. *Rowland*, 618.

STAMP TAX—See CARRIERS (2–4); COURTS.

STATE ROADS—See HIGHWAYS (5).

STATUTE OF FRAUDS.

1. An oral agreement by the owner of a building to pay a subcontractor for his work is binding upon him if such subcontractor abandons his contract with the principal contractor, so as to retain no claim against him, but not otherwise. *Wilhelm* v. *Voss*, 106.

2. The interest of contract purchasers in land cannot be surrendered by parol. *Grunow* v. *Salter*, 148.

See BOUNDARIES (3); CONTRACTS (1).

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STATUTE OF LIMITATIONS.

1. An executrix who unlawfully bids in, at a sale of decedent's property, lands devised to her for life, and who afterwards executes to a third person a deed purporting to convey the fee, cannot rely on the statute of limitations to make the title good as against the heirs, since the heirs could not maintain ejectment in her lifetime. *Litchfield* v. *Tunnicliff*, 383.

2. The saving to the creditor, in the statute of limitations, of the time that the debtor is absent from the State, applies to causes of action which accrue without the State between nonresidents. *Belden* v. *Blackman*, 448.

See MUNICIPAL CORPORATIONS (9); TRUSTS AND TRUSTEES (1).

STATUTES.

1. Act No. 71, Pub. Acts 1897, forbidding in section 1 the sale of cider vinegar containing less than one and three-fourths per cent. of cider vinegar solids, and providing in section 2 that "fermented vinegar" shall contain, in addition to such per cent. of solids contained in the fruit or grain from which it is made, two and a half tenths of one per cent. ash or mineral matter, requires that all fermented vinegar should come up to such standard, whether made from fruit or grain. *People* v. *Worden Grocer Co.*, 604.

2. In a prosecution for the sale of vinegar not in compliance with the statutory standard, a contention that the test provided for is arbitrary, unscientific, and not calculated to protect the public health against spurious vinegar, will not be considered, since the investigation of facts entering into questions of public policy merely is exclusively within the province of the legislature. *Id.*

3. The question of the reasonableness of a statute cannot be submitted to a jury, to be determined from expert testimony. *Id.*

See CONSTITUTIONAL LAW; DEPOT COMPANIES (1); RAILROAD COMPANIES (9–11).

STAY OF PROCEEDINGS—See RECEIVERS (3).

STOCK AND STOCKHOLDERS—See EQUITY JURISDICTION (3); EXECUTION (1, 2); PLEDGE.

STREET RAILWAYS.

1. Plaintiff's wife was driving, in a sparsely-settled neighborhood, a covered milk wagon, which had doors at the sides and a small window at the back. The weather was cold, and she had a shawl over her head and ears. Before crossing the track of an electric railway, upon which cars ran at half-hour intervals, she looked up and down the track, but no car was visible. She could see to the west a half mile. After crossing, she drove east, parallel with the track, but at such a distance therefrom that she thought a car could pass without hitting the wagon. The traveled portion of the roadway was

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STREET RAILWAYS—Continued.

narrow, and she guided the horse so that the wheels of the wagon would follow in the ruts. After driving about 300 feet, she heard a bell, and attempted to turn out farther, but, before she could do so, an east-bound car struck the wagon. *Held*, in an action against the company, not to show contributory negligence as a matter of law. *Manor* v. *Bay Cities Consolidated Railway Co.*, 1.

2. In view of the facts of the particular case, it was not reversible error for the court to charge that "she had a right to drive down the track just as she did, and if she turned out, or tried to turn out, immediately on the sounding of the gong, she was blameless, and there is no contributory negligence in the case;" and that "a man may drive ahead of you with a wagon, * * * but * * * you must wait until your opportunity comes to pass, and the same rule applies to a street car,"—further instructions making it clear to the jury that the question of contributory negligence was for their determination, and that if they should find that she drove in front of the car after she had turned out (as claimed by the company), and it was then so near to her that it could not be stopped, they should return a verdict of no cause of action. *Id.*

3. A street-railway company which is authorized to put in a "Y" at a given street, with the proviso that the company shall, if so ordered by the common council, remove the "Y" within 60 days after service upon it of a copy of an order of the common council directing it to do so, is bound by such agreement, and must remove the "Y" when ordered. *Rapid Railway Co.* v. *City of Mt. Clemens*, 133.

4. An ordinance authorizing a street-railway company to put in "such turnouts, switches, and side tracks as may be deemed necessary," and providing that the whole length of road shall be deemed one route, with a fare not exceeding five cents, does not authorize the construction by such company of a "Y" switch to make a turning point for another street-railway company. *Id.*

5. A pedestrian is, as a matter of law, guilty of contributory negligence, precluding a recovery for injuries received from being struck by a street car, where, after looking up and down the track when distant therefrom some 12 feet, and failing, because his view was obstructed by a covered wagon standing backed up to the curb, to see the approaching car, which would have been visible to him had he looked again when within two or three feet of the track, he proceeded directly in front of such car. *Doherty* v. *Detroit Citizens' Street-Railway Co.*, 209.

See MUNICIPAL CORPORATIONS (6).

SUBPŒNA DUCES TECUM—See WITNESSES (2).

SUBROGATION—See RES JUDICATA (1).

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SUMMARY PROCEEDINGS.

A lessee of land to whom the owner refuses possession under the lease cannot maintain summary proceedings under 2 How. Stat. § 8295, to recover such possession,—at least not until the estate of the owner, as a tenant at sufferance, has been determined by notice to quit. *Freeborn* v. *La Londe*, 662.

SUNDAY LAW—See SALE (3).

SURETYSHIP—See PRINCIPAL AND SURETY.

SURGEONS—See NEGLIGENCE (1).

SURVEYS—See RIPARIAN RIGHTS.

TAXES.

1. The failure of the board of review to enter the valuations of the several parcels of land, as fixed by it, in the column of the assessment roll prepared for that purpose, as required by section 29 of Act No. 206, Pub. Acts 1893, does not invalidate the tax, where it does not appear that any changes of valuation were made by the board, in view of the further provision that the roll as prepared by the supervisor shall stand as approved and adopted as the act of the board of review, except as changed by vote of the board. *Ball* v. *Ridge Copper Co.*, 7.

2. A valid decree in proceedings for the sale of land delinquent for taxes forecloses all questions as to the validity of the assessment. *Id.*; *Hall* v. *Mann*, 201.

3. The tax law of 1893 is not unconstitutional as depriving persons of their property without due process of law, in that it makes no provision for personal service of notice upon the delinquent taxpayer of the proceeding for the sale of his land, but, on the contrary, provides (section 66) that notice by publication shall be equivalent to personal service. *Ball* v. *Ridge Copper Co.*, 7; *Youngs* v. *Peters*, 45; *Hooker* v. *Bond*, 255.

4. Nor is the whole act rendered void by reason of the provision therein (section 72) attempting to make tax deeds conclusive evidence of title. *Ball* v. *Ridge Copper Co.*, 7.

5. Nor is the constitutional right of trial by jury violated by the provision of the act (section 72) authorizing the court to put the purchaser in possession of the premises by writ of assistance. *Id.*; *Youngs* v. *Peters*, 45; *Hooker* v. *Bond*, 255.

6. A valid decree for the sale of land delinquent for taxes forecloses all questions as to the regularity of the prior proceedings; and hence an objection cannot afterwards be raised that no demand for the payment of the tax was made by the township treasurer upon the person assessed, nor any effort made to collect the same from his personal property, as required by the statute. *Hughes* v. *Jordan*, 27; *Hooker* v. *Bond*, 255.

7. Under section 84 of the tax law of 1893 (Act No. 206, Pub.

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TAXES—Continued.

Acts 1893), providing that any person may purchase State tax land by paying the amount for which the same was bid off to the State, with interest thereon, together with the other taxes "remaining a lien" on the land at the time of purchase, a deed of State land, issued without the payment of a tax for a subsequent year, which was a lien on the land at the time of purchase, is void, even though such tax had not yet been returned by the collecting officer. *Hughes* v. *Jordan*, 27.

8. A tax sale to the State, which has been reported to the court and confirmed, will not be set aside because the land was struck off to the State on the first day of the sale, in violation of a provision of section 70 of the tax law of 1893 (Act No. 206, Pub. Acts 1893), even if the further provision of said section, that no sale shall be set aside after confirmation, except where the taxes were paid or the property was exempt from taxation, is an unlawful restriction on the general exercise of equitable powers. *Detroit, etc., Ins. Co.* v. *Wood*, 31.

9. *It seems* that the further provision of said section, that "the sale and all proceedings thereon shall be the same as if made on the first day fixed therefor," was designed to fix a time from which the redemption period should be computed, and does not authorize the dating of certificates and reports incident to the proceedings otherwise than in accordance with the facts. *Id.*

10. Under the provision of said section that, as soon as sales are confirmed, the county treasurer shall report the same to the auditor general, the treasurer is entitled to a reasonable time in which to make his report; and 10 days is not an unreasonable time to take for that purpose. *Id.*

11. The owner of land bid in by the State for taxes, after the expiration of the period for redemption, paid to the county treasurer a sum supposed to be sufficient to redeem from the sale and to pay the taxes of a subsequent year. The auditor general, when the transaction was reported to him, rejected the redemption certificate, but did not refund the subsequent taxes, and afterwards sold the land to a third person on payment of the amount of the State's bid. *Held*, that he should have treated the attempt to redeem and to pay subsequent taxes as a single transaction, and wholly unavailing, and should have required the purchaser to pay the subsequent taxes, as provided by section 84 of the tax law, failing which the deed issued to him was void, under *Hughes* v. *Jordan*, *supra*. *Id.*

12. A tax sale is not void for want of enrollment of the decree; the general provisions of the statute and court rules in relation to enrollment not being applicable to tax proceedings. *Youngs* v. *Peters*, 45; *Hall* v. *Mann*, 201; *Hooker* v. *Bond*, 255; *Barnum* v. *Barnes*, 264.

13. A report of a tax sale, made by the county treasurer to the auditor general 12 days after confirmation of the sale, is a sufficient compliance with the requirement of section 70 of

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TAXES—Continued.

Act No. 206, Pub. Acts 1893, that such report be made "as soon as the sale is confirmed." *Youngs* v. *Peters*, 45.

14. The auditor general is not a necessary party to a bill to set aside a tax deed on the ground of fraud and collusion between the purchaser and the county treasurer. *Christian* v. *Soderberg*, 47.

15. A tax deed is fraudulent and void as to a mortgagee of the premises, who purchased under foreclosure of his mortgage after the execution of the deed, where the mortgagor, in his capacity as county treasurer, fraudulently informed the mortgagee that there were no unpaid taxes on the land, and the grantee in the deed colluded with the mortgagor in the attempt to cut off the mortgagee's interest by a sale of the land for taxes. *Id.*

16. The owner of land which has been sold for taxes cannot attack the decree of sale in a collateral proceeding on the ground that he was prevented from paying the tax by the conduct of the collecting officer, but, as held in *Kneeland* v. *Wood*, 117 Mich. 174, he must in such case resort to one of the remedies prescribed by sections 70 and 98 of the tax law (Act No. 206, Pub. Acts 1893). Where, however, instead of pursuing such course, a landowner sought to set up an attempted payment as a defense in a suit to quiet title brought by the holder of the tax deed, entry of decree was deferred, and defendant given a reasonable time within which to avail himself of the statute. *Kneeland* v. *Hyman*, 56.

17. Under section 66 of the tax law of 1893 (Act No. 206, Pub. Acts 1893), authorizing substituted service of notice of hearing of the auditor general's petition for the sale of delinquent lands, and providing that if it shall be made to appear to the court, within five days after the day fixed for hearing, that any person, without fault on his part, has been prevented from filing objections to the tax, further time may be granted for that purpose, a decree of sale is void as to persons who did not appear, or otherwise waive the right to apply for further time, where it was rendered, and an adjournment taken, on the day following that fixed for the hearing. *Peninsular Savings Bank* v. *Ward*, 87.

18. A tax deed cannot be attacked collaterally upon the ground that the lands were held by the State by virtue of a State bid at the time of the filing of the auditor general's petition, and were therefore improperly included therein under section 61 of the tax law, as construed in *Connecticut Mut. Life Ins. Co.* v. *Wood*, 115 Mich. 444. (See note page 88.) *Id.*

19. The legislature cannot confer upon a township the right to issue bonds in aid of railroad companies. *Dodge* v. *Van Buren Circuit Judge*, 189.

20. A tax sale will not be set aside in equity because the owner of the land, a nonresident, had no actual notice of the proceedings, and supposed that the tax had been paid by one to whom he had sold the land by contract requiring the vendee to pay the taxes. *Hall* v. *Mann*, 201.

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TAXES—Continued.

21. An objection that a purchaser of State tax lands did not pay all taxes remaining a lien thereon at the time of purchase, as required by section 84 of the tax law of 1893, cannot be raised for the first time on appeal from an order dismissing a petition to set aside the sale. *Id.*

22. But, under the circumstances of this case, the record was remanded for rehearing, with leave to amend the petition. *Id.*

23. Under former decisions, a tax sale is not void because—
(1) The land was not assessed to the owner.
(2) No order *pro confesso* was entered.
(3) The decree was not entered in the record book of decrees, and did not contain a description of the property. *Hooker* v. *Bond*, 255.

24. The provision of section 66 of the tax law of 1893, that decree shall be rendered "at least 10 days prior to the time fixed for the sale," is directory merely, a failure to observe which does not invalidate the proceeding. *Id.; Barnum* v. *Barnes*, 264.

25. Furthermore, such a defect is clearly within the curative provision of the act (section 99). *Hooker* v. *Bond*, 255.

26. An objection that a certified copy of the decree in a tax proceeding was not annexed to the tax record, as required by section 67 of the tax law, will be disregarded on appeal, where the fact is not clearly shown by the record, and the objection does not appear to have been raised in the court below. *Id.*

27. A proceeding for the sale of land delinquent for taxes was found to have been based upon a petition forming a part of the tax record in the county treasurer's office, rather than upon an incomplete instrument found among the files in the office of the register in chancery. *Barnum* v. *Barnes*, 264.

28. The decree in a tax proceeding, as recorded, need not contain a description of the lands to be sold; the statute (Act No. 206, Pub. Acts 1893, § 67) contemplating that the tax record, with its entries, shall be considered a part of the decree by reference. *Id.*

29. A county treasurer's report of a tax sale, filed with the county clerk, may refer to the tax record for the particulars of the sale, and need not set forth the same in full. *Id.*

30. Under section 70 of the tax law, it is not necessary that the sale should be kept open for 20 days before bidding off the land to the State, but it is sufficient if, on being reoffered before the close of the sale, it is found impossible to sell the land for the amount of the tax. *Id.* 265.

31. Whether the validity of a tax sale can be questioned by petition in the main case after the rights of third parties have intervened, or whether the proper remedy is by bill of review, —*quære*. *Id.*

32. An affidavit attached to a copy of the petition of the auditor general for the sale of lands delinquent for taxes, and of the order of hearing thereon, stating that "the annexed printed

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TAXES—Continued.

notice was printed * * * for ——— successive weeks, at least once in each week, which publication commenced on the 23d day of September, 1893, and terminated on the 21st day of October, 1893," sufficiently shows a publication of said petition and order once in each week for four successive weeks, as required by section 66 of the tax law of 1893. *Garner* v. *Wallace*, 387.

33. The provision of section 78 of the tax law, requiring the auditor general to furnish to the county treasurer, in October of each year, a statement of all lands theretofore bid off to the State, then remaining unredeemed, was not designed for the benefit of the landowner, and hence a delay in forwarding such statement will not invalidate a subsequent sale by the State. *Id.*

34. And, for the same reason, the notice of sale of such lands, provided for by section 79, need not contain a description of the lands. *Id.*

35. An objection that a tax deed fails to recite the statutory authority for its issuance, and is therefore inadmissible to prove title in the grantee, is without force, where the fact that it was executed in pursuance of the statute appears from the files and records in the tax proceedings, which are introduced in evidence. *Id.*

36. A warrant for the collection of taxes is sufficient if directed to the township treasurer of a specified township and county, although it does not contain the treasurer's name. *H. M. Loud & Sons Lumber Co.* v. *Hagar*, 452.

37. Lands of H. M. L. & Sons Lumber Company, a corporation, were by mistake assessed to "H. M. L. & Sons," a copartnership. *Held*, that, under the curative provision of the tax law (Act No. 206, Pub. Acts 1893, § 99), the assessment was valid, and that a levy upon and sale of personal property of the lumber company to satisfy the tax was proper. *Id.*

38. Act No. 229, Pub. Acts 1897, which amended the general tax law by providing that no writ of assistance for the possession of land, "the title to which has been obtained under and in pursuance of any tax sale hereafter made," shall be issued until six months after the filing of proof of service upon the grantee in the last recorded deed, and the mortgagee in the last recorded mortgage, of notice of the right to redeem therein provided for, does not apply to previous purchases at tax sales upon which deeds had not been issued by the auditor general at the time the act took effect. *Pierpont* v. *Osmun*, 472.

39. Plaintiff, in replevin for property taken under a tax warrant to satisfy a tax levied in pursuance of a law of the State, cannot go behind the warrant and show the invalidity of the tax. *Roberts* v. *Denio*, 544.

40. Where a city council, assuming the invalidity of a sidewalk tax for a certain year, ordered the tax reassessed in the following year, and the land was sold for the taxes of both

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TAXES—Continued.

years, and the owner, in due season, sought to redeem from the second sale, the auditor general was justified in canceling the former sale, and issuing a certificate of error thereon, under section 98, subd. 2, of the tax law of 1893, authorizing such action in cases where the tax was paid "within the time limited by law for the payment or redemption thereof." *Youngs* v. *Auditor General*, 550.

41. Under section 30 of the tax law of 1893, requiring township boards of review to meet on the fourth Monday in May, at 9 o'clock in the forenoon, and continue in session during that day and the day following, the failure of the board to meet until the second of the specified days will not avoid the tax, although the landowner appeared on the preceding day, and claims to have been unable to attend thereafter. *Wright* v. *Auditor General*, 556.

See BIBLE READINGS (3, 4); DEPOT COMPANIES; EQUITY JURISDICTION (4, 5); ESTATES OF DECEDENTS (3); HIGHWAYS (3–5); INJUNCTIONS (4); LANDLORD AND TENANT (2); MUNICIPAL CORPORATIONS (7); RAILROAD COMPANIES (10, 11).

TEACHER'S CONTRACT—See SCHOOLS AND SCHOOL DISTRICTS (2).

TEACHERS OF RELIGION—See BIBLE READINGS (4).

TELEGRAPH COMPANIES.

1. An action by the sender of a telegram against the company to recover damages for failure promptly to transmit and deliver the message may be brought in *assumpsit*. *Carland* v. *Western Union Telegraph Co.*, 369.

2. The sender of a telegram is bound by the rules and regulations under which the company transmits messages only so far as they are brought to his knowledge. *Id.*

3. There is no presumption that business men are acquainted with the conditions usually imposed upon patrons by telegraph companies. *Id.* 370.

4. An operator of a telegraph company is the agent of the company in receiving over a telephone a message to be transmitted by the company, in the absence of any showing that the company forbade such practice, or that, if it was forbidden, the sender had notice of such regulation. *Id.*

5. The meaning of a cipher telegram may be shown by the sender in an action by him against the company for failure promptly to transmit the same. *Id.*

6. A statement by a telegraph operator to the sender of a message, that it has not been delivered, made as a report of his efforts to trace the telegram, is admissible, as against the telegraph company, to show the fact of nondelivery. *Id.*

TENANCY AT SUFFERANCE—See SUMMARY PROCEEDINGS.

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TITLE TO LANDS—See BOUNDARIES.

TITLE TO LAWS—See CONSTITUTIONAL LAW (1, 7); DEPOT COMPANIES (1).

TITLE TO PERSONALTY—See CHATTEL MORTGAGES (1); SALE (1, 2).

TORTS—See ACTIONS (1); BAILMENT.

TOWNSHIPS.

1. Whether a township may be sued in another county than that of which it forms a part, for a trespass to land in such other county,—*quære*. *Davis* v. *Township of Frankenlust*, 494.

2. Under 1 How. Stat. § 744, providing that the two justices of the peace whose terms of office will soonest expire shall be members of the township board, upon a vacancy arising in either of the senior terms the third justice succeeds to membership. *Laroue* v. *Conway*, 559.

See BRIDGES; HIGHWAYS.

TRADES UNIONS—See EMPLOYER AND EMPLOYÉ (1–6).

TRESPASS—See INJUNCTIONS (5); PUBLIC OFFICERS; TOWNSHIPS (1).

TRIAL.

1. Error, if any, in permitting plaintiff to introduce in evidence his books of account, showing that lumber was charged to defendant, was cured by an instruction that the fact that the charge was made to defendant was important only in case the jury should find that it was so charged by the authority or with the assent of defendant. *Temple* v. *Goldsmith*, 172.

2. An instruction that one to whom a statement of account was rendered was bound to raise objections to its accuracy within a reasonable time, and that 30 days would be a reasonable time for such purpose, is not prejudicial, as limiting him to 30 days as a matter of law, where no distinct error in the account in question is shown, and the only evidence of objection within a period of three years relates to the day after the account was rendered. *Raub* v. *Nisbett*, 248.

3. Error in sustaining an objection to a question is cured by subsequently permitting an answer. *People* v. *Swartz*, 292.

4. The action of the court in refusing to give certain instructions in the form requested by respondent, embodying instead, in the general charge, the substance of all that were material and proper, is to be commended, rather than condemned as error. *Id.* 293.

5. An instruction permitting the jury to find a certain fact is error, where there is no evidence upon which to base such a finding. *Goff* v. *Cougle*, 307.

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TRIAL—Continued.

6. Where plaintiff in his pleadings based his claim upon an alleged sale of property at a specified price, and presented his proofs on that theory, an instruction that, if the jury should find that defendant was to take the property and dispose of it, and account to plaintiff after deducting an amount due, and that the value of the property was not agreed upon, the jury might fix its value, and render judgment for the balance, was erroneous. *Post* v. *Voorhees*, 366.

7. In an action to recover the purchase price of property, evidence by the plaintiff regarding his purchase of the same, and the amount of money he then had, which had no bearing upon the question whether or not the contract sued on was executed, should have been excluded. *Id.*

8. A claim that deeds and a bill of sale executed by the plaintiff to the defendant were mortgages, and that the plaintiff's remedy was by foreclosure, is inconsistent with a plea admitting a sale of the property, and with the introduction in evidence by the defendant of a written release of all interest in the land, executed by the plaintiff. *Id.*

9. Refusal of requested instructions is not error where the court has properly stated the rules of law applicable to the case, and fairly submitted the questions involved. *Sloman* v. *Goebel Brewing Co.*, 442.

10. After the jury had retired, they summoned the clerk, in the absence of the trial judge, and gave him a note requesting further instructions. The request was communicated by telephone to the judge, who, in reply, dictated to the clerk an instruction which properly covered the subject of the inquiry. This instruction, after being reduced to writing and submitted to counsel, was delivered by the clerk to the jury. *Held*, that counsel could not for the first time object to the proceeding on motion for a new trial. *Barnett* v. *Saloman*, 460.

11. It is error for the court to permit plaintiff's counsel, in an action for injuries at a railroad crossing, to state to the jury in his closing argument his own observations with respect to the opportunity for seeing the track from the highway, based upon a visit to the scene of the accident. *Britton* v. *Michigan Central R. Co.*, 491.

12. Counsel has no right to place before the jury in an action for personal injuries, as tending to show that plaintiff was not guilty of contributory negligence, the fact that, by reason of his experience in damage suits, he would not have taken the case unless his client had satisfied him that he was free from negligence. *Id.*

13. It is error for the court, in an action for personal injuries, to permit plaintiff's counsel to urge the jury to include in their verdict compensation to plaintiff for the expense of litigation and the trouble in prosecuting the claim. *Id.*

14. A verdict is not obtained through coercion or restraint because rendered as directed by the court, who charged the jury on

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TRIAL—Continued.

Saturday afternoon that he was going home on the next train, and would adjourn court until Monday morning, and that, if they agreed upon a verdict, they should write it, and seal it in an envelope, and hand it to the sheriff, to be delivered to the judge when the court convened on Monday, and should then go to their homes, and return to their places in the court-room on Monday morning. *Stevenson* v. *Detroit, etc., R. Co.*, 651.

See AMENDMENTS; APPEAL AND ERROR (1, 4); CRIMINAL LAW; NEW TRIAL; PRACTICE IN CIRCUIT COURT; WITNESSES.

TRIAL BY JURY—See TAXES (5).

TROVER.

Where, after the levy of an execution, the defendant takes forcible possession from the custodian, the levying officer may bring trover. *Vanosdall* v. *Hamilton*, 584.

See PLEDGE.

TRUSTS AND TRUSTEES.

1. The fact that money due a *cestui que trust* is allowed by him to remain in the hands of the trustee after the termination of an express trust does not change the nature of the debt, and hence, until an accounting is had or demanded, the statute of limitations does not begin to run. *Jones* v. *Home Savings Bank*, 155.

2. A declaration of trust, comprised in a separate instrument accompanying a deed, will, as between the parties, be given the same effect as if embodied in the deed itself. *Williams* v. *Williams*, 477.

3. A trust in land reattaches, where the land, after being conveyed by the trustee to a *bona fide* purchaser, is subsequently redeeded to the trustee. *Id.*

See DEBTOR AND CREDITOR (2); DEEDS (4); MORTGAGES (1, 2); PARTIES; RECEIPTS.

UNDUE INFLUENCE—See DEEDS (4).

UNION DEPOT COMPANIES—See DEPOT COMPANIES.

USURY.

1. Where in an action upon a note drawn at usurious interest, the cause being tried before the court without a jury, the findings show simply that the defendant paid to the plaintiff prior to the commencement of suit, sums to a stated amount, it will be presumed that the payments were general. *Fretz* v. *Murray*, 302.

2. A general payment by the maker upon a promissory note, the interest on which is void as in excess of the rate prescribed by Act No. 156, Pub. Acts 1891, must be applied in reduction of the principal. *Id.*

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VENDOR AND PURCHASER.

1. A purchaser by quitclaim deed obtains no better title than that held by his grantor. *Hughes* v. *Jordan*, 27.

2. An attempt to surrender a land contract by delivering it to one of the vendors upon his suggestion that he will be satisfied to accept the contract and "let the interest go," but will have to consult the other vendor, is ineffectual without the other vendor's consent. *Grunow* v. *Salter*, 148.

3. A wife, having voluntarily given to her husband a sum of money, was told by him that whatever property he had should be hers at his death. A few days before his death, the husband, pursuant to the agreement, deeded his entire property to the wife. *Held*, that she could not hold the property, as a *bona fide* purchaser, as against one who had conveyed it to the husband in trust. *Williams* v. *Williams*, 477.

4. In an action by a vendor to recover the price of land, defendant testified that plaintiff represented to him, as an inducement to purchase, that he had examined the land, and found, at a certain depth below the surface, the same plaster rock that was to be found on adjoining land, where there were valuable quarries, with which defendant was familiar; that, relying on such representation, he made the purchase; and that the land proved to be worthless for plaster purposes. *Held*, that the evidence justified the submission to the jury of the question of plaintiff's fraud. *Morman* v. *Harrington*, 623.

5. The fact that a vendee of land paid a balance on the purchase price, and received his deed, after the discovery of fraud on the part of the vendor, will not estop him to recoup his damages occasioned by the fraud, in an action by the vendor upon the vendee's guaranty of stock transferred as part of the consideration. *Id.*

6. In support of a defense of fraudulent representations as to the value of land, the vendee may show the price paid by the vendor. *Id.*

See LANDLORD AND TENANT (1); RECORDING LAWS; STATUTE OF FRAUDS (2); TRUSTS AND TRUSTEES (3).

VENUE—See PUBLIC OFFICERS; TOWNSHIPS (1).

VENUE, CHANGE OF—See CRIMINAL LAW (3).

VERDICT—See APPEAL AND ERROR (2); JURY; TRIAL (14).

VERIFICATION OF PETITION—See INSANE PERSONS (1).

VETO POWER—See MUNICIPAL CORPORATIONS (4, 5).

VINEGAR, RESTRICTIONS UPON SALE OF — See CONSTITUTIONAL LAW (7); CRIMINAL LAW (7, 8); STATUTES (1, 2).

WAIVER—See BAILMENT; EXECUTION (6); FIRE INSURANCE (6); MUNICIPAL CORPORATIONS (8, 11); MUTUAL BENEFIT ASSOCIATIONS (3); REPLEVIN (2).

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WARRANT—See TAXES (36, 39).

WARRANTY—See ACTIONS (2); NEGLIGENCE (2).

WATER-CRAFT LAW—See JURY (1).

WATERS—See LAKES; PUBLIC OFFICERS; RIPARIAN RIGHTS.

WILLS.

1. The common-law right of a testator to delegate the power to choose his executor has not been abrogated by statute in this State. *Brown* v. *Just*, 678.

2. A clause in a will, "I make no selection of an executor of this will, but leave it for the judge of probate who may be acting when this will becomes operative to make an appointment of some suitable person for that purpose," confers upon the judge of probate the power of such appointment. *Id.*

3. 3 How. Stat. § 5849, providing that administration of the estate of a person dying intestate shall be granted to the widow or next of kin, or both, or such person as they may request to have appointed, if suitable and competent to discharge the trust, does not apply where the deceased left a will authorizing the judge of probate to appoint some suitable person as executor. *Id.*

4. Upon an issue as to whether a testator made a valid delegation to the probate judge of the power to appoint an executor of the will, the alleged want of interest of the persons who support the right of the executor appointed by the probate court as against the nominee of the next of kin cannot be considered; the determination of property rights pertaining, not to the probate of the will, but to the distribution under it. *Id.*

5. An executor, whether named in the will or by delegated power, has the right to defend in the courts his authority to act. *Id.*

WITNESSES.

1. A defendant who has testified, on cross-examination, that he never tendered a certain amount in court, cannot be shown an unaccepted written offer of judgment, and asked if he ever made an offer of such amount, since such a proceeding places the writing before the jury as effectually as if it were read in evidence, in contravention of 2 How. Stat. § 7372, which provides that such an offer, if unaccepted, is to be deemed withdrawn, and "cannot be given in evidence." *Walbridge* v. *Barrett*, 434.

2. The court may, where written documents are in court, order their production and admission in evidence, if found to be material, although no *subpœna duces tecum* has been issued. *Hunton* v. *Hertz & Hosbach Co.*, 475.

See CRIMINAL LAW (9–11); LIBEL AND SLANDER.

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WORDS AND PHRASES: DEPOSITORS—See BANKS AND BANKING.

GENERAL ELECTION — See ELECTIONS (5).

REASONABLE DOUBT — See CRIMINAL LAW (6).

WRIT AND PROCESS—See GARNISHMENT (1, 3); RECEIVERS (2).

WRITS OF ASSISTANCE—See CORPORATIONS (1); TAXES (5, 38).

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